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OCTOBER TERM, 1951

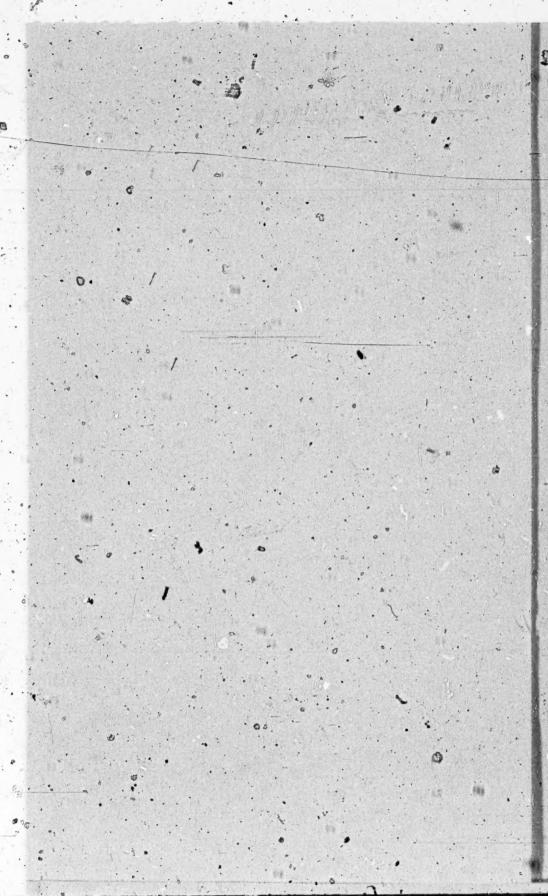
No. 186

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION, PETITIONER,

vs.

ROANE-ANDERSON COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSES.



SUPREME COURT OF THE UNITED STATES

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SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION, PETITIONER,

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[fol. 1] IN SUPREME COURT OF TENNESSEE

Davidson Equity

Reversed

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON CHEMICAL CORPORATION, etc.

VS.

SAM K. CARSON, COMMISSIONER, etc.

DECREE-March 9, 1951

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed and that the transactions in controversy in this cause are not subject to the tax provided for in the Tennessee Retailers' Sales Fax Act of 1947 and that the Commissioner of Finance and Faxation of the State of Tennessee is permanently enjoyed from seeking to apply said Act to transactions of this character.

It is further ordered and decreed by the Court that the Carbide and Carbon Chemical Corporation et al. have and recover of the State of Tennessee the sum of \$2,148.08 with interest thereon from January 19, 1948 to this date, being \$402.68, in all the sum of \$2,550.76, and all the costs of this cause, all of which will be certified for payment in the manner prescribed by law. (3/9/51.

[fol. 2] . IN SUPREME COURT OF TENNESSEE

Davidson Equity

Reversed.

WILSON-WEESNER-WILKINSON COMPANY et al.

V8.

SAM K. CARSON, COMMISSIONER, etc.

DECREE-March 9, 1951

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed and that the transactions in controversy in this cause are not subject to the tax provided for in the Tennessee Retailers' Tax Act of 1947 and that the Commissioner of Finance and Taxation of the State of Tennessee is permanently enjoined from seeking to apply said Act to transactions of this character.

It is further ordered and decreed by the Court that the Wilson-Weesner-Wilkinson Company et al. have and recover of the State of Tennessee the sum of \$111.87, with interest thereon from January 19, 1948 to this date, being \$21.05, in all the sum of \$132.92, and all the costs in this cause, all of which will be certified for payment in the manner prescribed by law. 3/9/51.

IN SUPREME COURT OF TENNESSEE

Davidson Equity

Reversed

ROANE-ANDERSON COMPANY, etc.

· VS

SAM K. CARSON, COMMISSIONER, etc.

DECREE-March 9, 1951

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed and that the transactions in controversy in this cause are not subject to the tax provided for in the Tennessee Retailers' Sales Tax Act of 1947 and that the Commissioner of Finance and Taxation of the State of Tennessee is permanently enjoined from seeking to apply said Act to transactions of this character.

It is further ordered and decreed by the Court that the Roanc-Anderson Company have and recover of the State of Tennessee the sum of \$1,264.98 with interest thereon from November 14, 1947 to this date, being \$252.99, in all the sum of \$1,517.97, and all the costs of this cause, all of which will be certified for payment in the manner prescribed by law.

3/9/51.

IN SORREME COURT OF TENNESSEE

Davidson Equity

Reversed.

CARBIDE & CARBON CHEMICAL CORPORATION, etc.

SAM K. CARSON, COMMISSIONER, etc.

DECREE-March 9, 1951

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel. upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be reversed and that the transactions in controversy in this cause are not subject to the tax provided for in the Tennessee Retailers' Sales Tax Act of 1947 and that the Commissioner of Finance and Taxation of the State of Tennessee is permanently enjoined from seeking to apply said Act to transactions of this character.

It is further ordered and decreed by the Court that the Carbide and Carbon Chemical Corporation have and recover of the State of Tennessee the sum of \$2,383.58 with interest thereon from November 14, 1947 to this date, being:\$476.71, in all the sum of \$2,860.29, and all the costs of this cause, all of which will be certified for payment in the manner pre-

scribed by law. 3/9/51.

Davidson Equity

Stay Order

CARBIDE & CARBON CHEMICALS CORPORATION

VS.

SAM K. CARSON, Commissioner of Finance and Taxation

and

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation

and

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON CHEMICALS CORPORATION

VS.

Sam K. Carson, Commissioner of Finance and Taxation

and

WILSON-WEESNER-WILKINSON COMPANY and ROANE-

VB.

Sam K. Carson, Commissioner of Finance and Taxation

DECREE-March 16, 1951

On application of James Clarence Evans, Commissioner of Finance and Taxation of the State of Tennessee, appellee in these consolidated causes, that the judgment heretofore entered in these consolidated causes be stayed pending application to the Supreme Court of the United States for the writ of certiorari, and it appearing to the Supreme Court of Tennessee from the statement of counsel and from the application that petition for the writ of certiorari will be filed in the Supreme Court of the United States within the ninety-day period fixed by law, and that counsel representing the

opposing parties in these consolidated causes, except the [fol. 6] intervenor, has been notified of this application for a stay order, and has not appeared to resist the same:

It is ordered that the judgment entered in said consolidated causes be stayed for a period of ninety days from March 9, 1951. 3/16/51.

(S.) A. B. Neil, Chief Justice, Supreme Court of

Tennessee.

[fol. 7] [File endorsement omitted]

IN SUPREME COURT OF TENNESSEE

CARBIDE & CARBON CHEMICALS CORPORATION

VS.

SAM K. CARSON, Commissioner of Finance & Taxation, etc.

and

ROANE-ANDERSON, COMPANY

VS.

SAM K. CARSON, Commissioner of Finance & Taxation, etc.

and

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON,

V8.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDER-SON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

OPINION-March 9, 1951

For Appellants: S. Frank Fowler, Knoxville, Tennessee. For U. S. Government, Intervenor: T. L. Caudle, Ellis N. Slack, and Berryman Green, all of Washington, D. C.

Of Counsel: Joseph Volpe, Jr., Bennett Boskey, both of Washington, D. C., J. Wallace Ould, Jr. and Harold L. Price, Oak Ridge, Tennessee. For Commissioner of Finance and Taxation, Appellee: Roy H. Beeler, Attorney General; William F. Barry, Solicitor General; and Allison B. Humphreys, Jr., Advocate General, all of Nashville, Tennessee.

Opinion

[fol. 8] The question for our decision in these consolidated cases is whether or not the appellants are liable for sales taxes and use taxes as applied by Chapter 3 of the Public Acts of 1947, as amended, Retail Sales Tax Statute.

Both of these taxes are privilege taxes and they have been defined by this Court as: "The sales tax imposes upon the seller a tax for the privilege of selling tangible personal property and is required to be paid by the seller. Hooten v. Carson, 186 Tenna, 282, 283, 209 S. W. (2d) 273. The use tax is a tax upon the privilege of using, consuming, distributing or storing tangible personal property after it is brought into this State from without this State." Madison Suburban Utility District v. Carson, — Tenn. —, 232 S. W. (2d) 277, 280.

The present suits were brought as test cases. During the fall of 1947, the appellants paid under protest a sum of money slightly in excess of \$5,000.00 to the Commissioner of Finance and Taxation, and brought suit, as provided by Tefinessee Code sections 1790 et seq., to recover such taxes. It was said in argument that about two million dollars is eventually involved. After suits were instituted and during the progress of the trial, the United States government petitioned to and was allowed to intervene as an intervenor herein. The position taken by the United States government is identical in all respects with [fol. 9] that of the appellants named above. It was stipulated during the progress of the trial that since the suits were instituted, the Commissioner of Finance and Taxation was then James Clarence Evans and the suits were revived as to him.

The chancellor held that the taxes were properly collected by the Commissioner of Finance and Taxation and accordingly dismissed the suits. These suits have been consolidated, were argued together, and it was agreed that we could render one opinion applicable to all, as the questions raised were identical. These suits involve a popular transaction between the contractors and the vendors wherein the question of whether or not this Tennessee sales tax and use tax are applicable under the factual situation as

very thoroughly developed in this large record.

There are numerous assignments of error. As a whole, though, these assignments go to the finding or the failure of the chancellow of find facts according to the contention of the appellants. There are two contentions made by the appellants, both of which were answered contrary to their contention by the chancellor, either of which if answered in the affirmative would sustain the suits in these cases. These contentions are: (1) That the Tennessee Sales Tax Statute as applied to purchases and procurements herein is mivalid and an infringement of the Federal constitutional immunity [fol. 10] of the means and instrumentalities employed by the United States to carry on its functions and (2) that if there is no implied Federal constitutional immunity under the facts developed in this case, that then under the terms of Section 9(b) of the Atomic (Energy Act, creating this Federal agency, that Congress has exempted the property, income, and activities of the Commission from state or local taxation 'in any manner or form."

Why these contentions?

Prior to our entering World War II in December, 1941, scientists were convinced that an atomic weapon could be made. These scientists with a group of other convinced the President of the United States and his advisers that this could be done. Accordingly, the President appointed a committee who in turn further convinced him of the possibilities of such a weapon, and from this the government began the development of facilities to develop such a weapon. It was necessary in the development of atomic energy that great secrecy be kept; that the proceedings toward development of such energy be ga atly separated, for security reasons and for reasons of health and safety of the people of the United States, because "probably the. largest calculated risk anyone ever took" (Smyth Report) was being undertaken. Thus, rather isolated large areas of land were acquired in different sections of the United States, such as approximately 59,000 acres in Anderson and Roane Counties, Tennessee on the Clinch River; Han-[fol. 11] ford, Washington on the Columbia River; and Los Alamos, New Mexico. Other places for research were acquired and used near the University of Chicago, etc. o

As a part of this effort, the government in September, 1942 began to develop the Clinton Engineering Works, commonly called Oak Ridge, which was a unit of the Manhattan District established under the War Powers Act on executive orders of the President of the United States to carry on this research and development of the atomic bomb. The Manhattan District was under the direction of the United States Army Corps of Engineers; and the bomb was the immediate objective.

"A weapon has been developed that is potentially destructive beyond the wildest nightmares of the imagination; a weapon so ideally suited to sudden unannounced attack that a country's major cities might be destroyed overnight by an ostensibly friendly power. This weapon has been created not by the devilish inspiration of some warped genius but by the arduous labor of thousands of normal men and women working for the safety of their country." Smyth Report, page 163, released in August, 1945.

Because of the enormity of the problem that was involved and the fact that no individual or corporation had had any experience in this particular kind of a field, it was necessary for the Army Engineers to employ various and sundry large corporations of America who had the "know-how" in various and sundry scientific fields and other fields which [fol. 12] were necessarily involved in the development of atomic energy. Consequently, the government entered into cost-plus-fixed-fee contracts with these corporations. mention a few are: Carbide & Carbon Chemical Corporation: Monsanto Chemical Corporation; General Electric Corporation: DuPout Company, and many others. It soon developed that it would be necessary to construct housing facilities for the workers and employees and key personnel of these various companies who were to operate these enormous plants. For instance, at Chinton, Tennessee, an entire new dity of some forty or fifty thousand people grew up almost overnight is To operate this city for these people, all of the facilities for a modern city were needed. The Army did not possess the "know-how" to develop such a city but they had had experience with a construction company in New York who knew how to do such a thing, consequently, this construction company was contacted and they in turn ... formed the Roane-Ande on Company, a Tennessee corporation, for the purpose of operating the Town of Oak

Ridge. Roane-Anderson entered into a cost-plus-fixed-fee contract with the Army for this work. The Carbide & Carbon Chemical Corporation entered into a like contract with the government to operate certain plants at Oak Ridge.

This development under the Army Corps of Engineers was of course designed to achieve the maximum military result which it did, as all of us now know. In the develop-[fol. 13] ment of nuclear energy it became apparent to those connected with this development that it would be necessary for the government to maintain some sort of control in this field after the war. As a result of this feeling, recommendations were made to the Congress of the United States who after a full debate passed an Act for the development and control of atomic energy, August 1, 1946. This complete Act is carried in U. S. C. A. 42, Sections 1801 through 1819. By this Act, the Atomic Energy Commission was created, and they constitute a committee having a governmental. monopoly in this field of atomic energy. This Act, among other things, declares that "the development and utilization of atomic energy shall, so far as practicable, be directed toward improving public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting World peace."

The Atomic Energy Commission, having a right to do so under the Act, saw that their duties were so gigantic and complicated technically that it would be impossible for any one company to handle their undertakings. Accordingly, the Commission has entered into various and sundry costplus-fixed-fee contracts with various and sundry contractors who possess the "know-how" in their respective fields. The Commission in this way either directly or through these contractors, carries on a wide and extensive program for the United States government in the field of atomic [fol. 14] energy, including the production of materials for atomic weapons, and the production of radio-active materials for the use and research and development activities relating to atomic energy. The plants selected and established by the Army Corps of Engineers have been continued.

The land and all facilities in the plant at Oak Ridge are wholly owned by the United States government.

The principal contractor of the Commission in Oak Ridge for the operation of its plants there is the appellant Carbide & Carbon Chemical Corporation (hereinafter for short referred to as Carbide.) The town management contractor for the Town of Oak Ridge is the appellant, Roane-Anderson Company (hereinafter referred to as Roane-Anderson). Carbide operates the production facilities at Oak Ridge and these concentrate on the production of uranium-235, a fissionable material, over which the Commission is given by the Actamonopoly. Carbide also operates various and sandry other plants there. Carbide also operates at present the Oak Ridge National Laboratory, a laboratory for atomic energy research. In the laboratories, research of fundamental importance to production and use of fissionable material is carried on and radioactive isotopes which are proving an enormous benefit to medical, biplogical, agricultural, and industrial research of all kinds are produced and distributed.

The Town of Oak Ridge, as heretofore said, is located on[fol. 15] Commission-owned site and exists for the sole purpose of providing the necessary community facilities and
services to some thirty-old thousand people employed by
the Commission and its contractors at the Oak Ridge installation. Most of the necessary town management functions
and services are carried out by Roane-Anderson pursuant
to its cost-plus-fixed-fle contract. Roane-Anderson operates the normal municipal services, such as utilities, fire
protection, garbage disposal, and maintenance of roads and
streets, and also oversees the operation of concessions, and
performs a number of other services necessary to the welfare of the employees at the atomic energy facilities.

The first two cases brought are for the purpose of testing the use tax where Carbide and Roans-Anderson purchased from an out-of-state vendor. The third and fourth cases are to test the sales tax, the third being where coal was bought by Carbide from the Diamond Coal Mining Company and the other being a machine bought by Roans-Anderson from the Wilson-Weesner-Wilkinson Company.

The first contention made by these appellants, along with the United States Government, is that Carbide and Roane-Anderson are not independent contractors but are agencies or instrumentalities of the United States Government, and are, therefore, not subject to the tax. If the appellants are independent contractors, they would be liable for the tax [fol. 16] because the implied immunity under the United. States Constitution would not apply to them for reasons hereinafter set forth, unless this implied immunity is properly implemented by a Congressional Act. Let us, therefore, first investigate the contracts between these appellants and the Commission and try to determine whether or not they are agencies of the Commission or independent contractors.

The distinctions between an independent contractor and an agent are not always easy to determine, and there is no uniform rule by which they may be differentiated. "Generally, the distinctions between the relation of principal and agent and employer and independent contractor is based on the extent of the control exercised over the employee in the performance of his work, he being an independent contractor if the will of the employer is represented only by the result, but an agent where the employer's will is represented by the means as well as the result." 2 C. J. S., page 1027.

The distinction generally between an independent contractor and an agent "depends upon the intention of the parties as expressed in the contract." Standard Oil Co. of La. vs Fontenot, La. 4 So. (2d) 634, 643. We must, therefore, in the first instance look to the contract between these parties for the intention therein expressed rather than look to the Acts of the parties. Of course, every case must be [fol. 17] determined under the contract and the facts of the particular case. It frequently occurs, as it apparentdoes in the instant ease, that contractors have made a contract with a party and have served over a long period of time in such an efficient and excellent manner that the contractor acts somewhat in many capacities as though he were the agent of the person with whom he has contracted. This is especially true in a cost-plus-fixed-fee contract wherein the contractor is reimbursed for any and all expenditures and he is doing the character of work he does in the instant The operations of these contractors are in general separate from the normal scope of business operations of the companies; Roane-Anderson was established for the sole purpose of carrying out its community management activities under contract with the Commission; and Carbide has set up a separate division to carry out its contract with the Commission. The contracts are of a long-term, continuing relationship between government and industry. They do not contemplate the performance of a particular narrowly-defined task for which the outlines are fully known

in advance, but are entered into with knowledge that operations are subject to continual revision, modification, and change, in the light of technical development and as a result of the evolution of Commission policy.

The programs carried on by these contractors are programs for which the Commission is responsible. The nature [fol. 18] and scope of these programs obviously is subject to the determination of the Commission but at the same time the contractor possessing the "know-how" in its own particular field conducts its work according to its determination of how this work should be done. The land, materials, equipment, supplies, plans, designs, and records used in the operation of the facilities, as well as the products of the operation, belong to the Commission. Knowledge, techniques, inventions and discoveries gained from the work. are subject to strict control by the Commission. The work of the contractors is subject to close supervision at all stages and at all times by representatives of the Commission who have offices at the Oak Ridge site, and whose chief responsia bilities center on the operations carried on by the operating These Commission representatives establish policy, supervise and inspect the work, review sub-contracts and purchases for approval, inspect and audit the records in accounts of the contractors, and cooperate with the contractors in the solution of the manifold problems connected with the operating of the facilities. The work must be carried on in accordance with the safety and security regulations of the Commission, and those employees of the contractors who have access to restricted data are investigated by the F. B. I., and given security clearance by the Commission. Key personnel of the contractors' organizations may be employed with the approval of the Commission. [fol. 19] The salaries of all of their employees are controlled by policies and standards approved by the Commission and the Commission may direct the dismissal of any such employees whom the Commission deems "incompetent, careless or insubordinate," or whose continued employment is deemed inimical to the public interest.

The contractors are not required to risk their own money in the operation of Commission facilities. This provision of the contract obviously came about by reason of the enormity of the project, the newness of what was being done and of the uncertainty of the result. It is said that "regardless of what happened the government would pay the bill" and it was on this basis that the contracts were originally made with the various companies in the production of atomic energy. All the contracts have a "hold-harmless" provision and the expenses and procurements are on a reimbursable basis. The Carbide contract specifically provides that Carbide shall not be obligated to use any of its own funds in the performance of work under the contract, and further provides that, upon request of the contractor, the government shall advance monion to be used for carrying out the purposes of the contract. Under this provision, Carbide has used only government money for activities under its contract. Roane-Anderson originally used some of its own money in performing its contract, revenues which it collected from concessionaires and occupants of housing in Oak Ridge [fol. 20] soon made up the greater part of its funds which were used in the contract. Roane-Anderson's contract provided that such monies collected should be used to reduce the cost of the work. Since October, 1948, Roane-Anderson has been receiving advances to carry on its work in the same manner as Carbide.

Most of the materials and supplies necessary to the operation of the Commission facilities are purchased by or through the contractors. By contract the Commission reserves the right to pay suppliers directly, but customarily permits payments to be made by the contractors, who are then reimoursed by the government. Although the con-s tracts originally provided that title to articles acquired. under the contracts shouls pass to the government at a point designated by the contracting officer, the record shows that as a matter of practice, title to such articles has never been considered to be in the contractor but has always been treated as having passed to the government at the time title passed from the vendor. The language of the contract is contrary to the existing practices of the parties. Since 1948, the contract of Roane-Anderson has provided expressly that in the procurement of supplies necessary to the performance of work under the contract, Roane-Anderson should act as the agent of the government, but "all personnel and labor shall be and remain for all purposes the employees of the Contractor."

[fol. 21] The record shows that ordinarily the vendor looks to the contractor for payment! The custody then is

vested in the contractor who puts it in one of the various storing houses of the Commission and the property is stamped to show that the property belongs to the United States Government and then with another designation of either Carbide or Roane-Anderson. The goods are usually shipped on a government bill of lading or on a commercial bill of lading with a notation to be converted to government bill of lading at destination. This was done to save some cost in shipment expenses. Since 1948, the contractor has paid the Federal transportation tax except where shipment was to the Government on a government purchase order.

The general manager of the Commission in a statement submitted to a congressional committee on February 17,

1949, in part said:

"Operation of our plants and laboratories through established independent contractors not only gives to the Atomic Energy Program substantial benefits from accumulated experience and established facilities; it also establishes the interest and the support of industry and universities for future private development."

Of course, the terming of these contractors, "independent contractors" by Mr. Wilson does not necessarily deter[fol. 22] mine the question. We must look to the contracts, facts and intent of the parties, etc. as heretofore said. This, though, does give a rather clear statement as to what the intention of the Commission was in making these contracts.

Another indication and illustration as contained in the contracts is that if the bills for the purchase of materials, machinery or equipment or payrolls are not paid promptly by the contractor or the sub-contractor, the contracting officer may in his discretion withhold payments otherwise due, equivalent to the amounts of such unpaid items. The contract also provides that upon the completion of the work that the Government in making settlement with a contractor may withhold any sum necessary to settle claims against the contractor. The contract provides: "The contracting officer shell accept the completed work hereunder with reasonable promptness."

The nature of the plant operation is such that the government does not have on its staff or in its employ the technical means or qualifications to operate the plant. Each of the production plants is operated by a contractor who has considerable experience in the industrial operation of a chemical separation plant and gaseous diffusion plants, electromagnetic separation plants, etc. The work of Roane-Anderson in city management is a specialty for which they were particularly selected.

We must hold that after making a rather thorough study [fol. 23] of the contracts of Carbide and Roane-Anderson and the facts developed in this record, that these contractors are independent contractors. Omitting for the present any consideration of the provisions of the Atomic Energy Act with reference to the contractors herein, we might say that as far as we know the Congress has never seen fit to pass a general act immunizing general contractors who are doing work for the government wherein the government in the end had to pay the taxes assessed against the contractors. The reason that Congress has not passed such a general act is probably because "the burden of Federal taxation necessarily set an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the Federal Government affect in some measure the cost of operation of the other." As "neither government may destroy the other or curtail in any substantial manner the exercise of its powers," the taxing power of each, so far as it affects the other, "must receive a practical construction which permits both to function with the minimum of interference, each with the other: and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax-or the appropriate exercise of the functions of the government affected by it." Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384.

[fol 24] The recent decisions of the Supreme Court of the United States have held that state taxes on independent contractors with the United States Government were subject to collection and that there was no implied immunity insofar as these independent contractors were concerned. A very excellently reasoned case is that of James v. Dravo Contracting Company, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 ALR 318; wherein a state tax on the gross receipts of a contractor with the Federal government was allowed. State sales and use taxes on purchases of materials used by a contractor in performing a cost-plus-fixed-fee contract

with the United States was allowed in State of Alabama v. King & Boozer, 314 U. S. 1, 62 S. Ct. 43, 86 L. Ed. 3, 140 . ALR 615; Curry v. U. S., 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9. The Court in King & Boozer case, supra; pointed out that "-the Constitution, unaided by congressional legislation (does not prohibit), a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the government, that is but a normal incillent of the organization within the same territory of two independent taxing solvents. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added cost, attributable to the taxa-[fol. 25] tion of those who furnish supplies to the government and who have been granted no tax immunity." (Emphasis ours.)

The question is now foreclosed under the authorities last above cited. True, eminent legal minds have differed on the conclusions reached in these cases, as is evidenced by the very strong dissent of Mr. Justice Roberts in which he was joined by Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler in James v. Dravo, supra. This dissent and many authorities therein cited runs somewhat like the argument on behalf of the contractors in their insistence on the first contention made, that is, that the contractors herein had an implied immunity from state taxation because the Federal government was bearing the burden of this tax.

The second contention has given us far greater concern than the first and as we view it, it is the question in the lawsuit.

We assume, since no question is here raised, that the creation of the Atomic Energy Commission, 60 Statute 755, 42 U. S. C. A., 1801-1819, was a constitutional exercise of the congressional power and that the activities of the Commission through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments. Pittman v. Home Owners' Lean Corp.

[fol. 26] 308 U. S. 21, 60 Set. 15, 84 L. Ed. 11, 124 ALR, 1263.

It was conceded in the argument that the Congress has the power to protect the instrumentalities thus created by it. This concession must necessarily follow in view of certain provisions of the United States Constitution, as follows:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States—" Article IV, Sec. 3, Cl. 2. It also gives Congress the power "To make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States." Article I, Sec. 8, Cl. 18, U. S. C. A. It makes the laws of the United States enacted pursuant thereto, "the supreme law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Article VI, Cl. 2.

This power of Congress to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of agencies of the Federal government has been recognized a number of times by the Supreme Court notably [fol. 27] in Pittman v. Home Owners' Loan Corporation, supra; Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95, 62 S. Ct. 1; U. S. v. Allegheny County, 322 U. S. 174, 64 S. Ct. 909, 88 L. Ed. 1209, and other cases therein cited.

In the Pittman case, it was said by the Court that:

"In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field."

In questions of the kind, whether immunity shall be extended to situations like those in the instant cases is essentially a legislative question, because as we have seen above, in the treatment of the first contention made herein, such immunity is not granted when unaided by congressional legislation. Did the Congress of the United States enact

appropriate legislation to immunize the contractors involved in the instant case?

If such immunity exists, it is derived from Section 9(b) of the Atomic Energy Act (42 U. S. C. A., Sec. 1809). The answer to the question rests primarily upon a proper construction of this section of the Act. The pertinent part thereof is as follows:

"The commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any state, county, municipality, or any subdivision thereof." (42 U.S. C.A. Sec. 1809, sub-division b.) (Emphasis ours.)

[fol. 28] Obviously, the question presented is whether the purchase and use of materials and supplies by cost-type contractors of the Atomic Energy Commission in the performance of their contracts are part of the "activities—of the Commission" within the intendment of the provision just quoted and are thereby exempted from taxation by any state, county or subdivision thereof "in any manner or form."

The Atomic Energy Commission as an agency of the executive branch of the United States Government is entitled to all the privileges, immunities and rights of the United States, including that of immunity from state and local taxation: Graves v. N. Y., ex rel O'Keefe, 306 U.S. 466, 59 S. Ct. 593, 83 L. Ed. 927, 120 ALR 1466. This is and would have been true had Section 9(b) of the Act above

quoted not been included in the Act.

Section 9(b), in its first three sentences authorizes the Commission under stated conditions and circumstances to make payments to state and local governments (in its discretion) for loss to them of taxes due to the government taking this property and it is noted that there is no submission to state and local taxation. In the fourth and concluding sentence of Section 9(b), Congress provided the exemption above quoted in which it specifically says that the "activities" of the Commission shall not be taxed "in any manner or form."

Should we give this exemption a narrow construction or [fol. 29] should the exemption be construed by us so as to give it a scope commensurate with the broad activities carried on by the Commission at its major installations?

The chances or was of the opinion that since Congress

had included the word "agents" in the third sentence of Section 9(b) of the Act, that is the sentence immediately preceding the exemption sentence above quoted, that it was not the intention of Congress to relieve these contractors from taxation. His reasoning is based upon the fact that since 9(b) expressly authorized the Commission to reimburse state and county or local governments for the amount of taxes lost by them due to the acts of the previous parties and the Manhattan District and their agents that then by eliminating the word "agents" out of the exemption provision that this clearly indicated that Congress did not intend to include these contractors in the exemption.

We do not see how the Congress could have chosen a much broader word than it did when it chose the word "activities" to use in its application for those things that were exempt from taxation "in any manner or form." It seems that there was absolutely no reason, in view of using this broad term "activities" to specify individuals or individual actors because the term within itself would cover anything that the Commission was undertaking to do.

Congress prior to the enactment of the Atomic Energy Act and subsequent thereto knew of the services of operating contractors at the major atomic energy installations [fol. 30] and knew that it had been the practice of the Manhattan Engineering District to conduct its activities through these operating contractors. At Oak Ridge, for example, the Monsanto, Carbide and Roane-Anderson and Stone and Webster and numerous other contractors operated in comducting the activities there and these contracts which were entered into then by the Manhattan District were transferred over to the Atomic Energy Commission by executive order of the President. At the Hanford operations the DuPont Company had served as an operating contractor duringshe war and was succeeded by the General Electric Company. At Los Alamos the University of California had been the operating contractor for the weapons work from the very start of activities at that remote site. Similarly, the University of Chicago had been the operating contractor for the Atomic energy activities centered in the Chicago The Carbide people had operated the gaseous diffusion production facilities at Oak Ridge since they were constructed. The Roane-Anderson people were specially formed for the purpose of managing and operating the Town of Oak Ridge for the Manhattan District. All of these circumstances were well known to the Congress when it had under consideration the various proposals for atomic

energy legislation.

At the time hearings were held on the May-Johnson Bill (H.R. 4280, H.R. 4566, 79 Cong., 1st sess.) and the McMahon [fol. 31] Bill (S. 1717, 79 Cong., 1st sess.) Congress had before it the Smyth Report, which we have heretofore referred to and quoted from, which becounted the major role of university and industrial contractors in the development of atomic energy and the production of the atomic bomb under the Manhattan Engineering District.

The then Secretary of War stressed in his testimony on the pending legislation the need for continuing "well-integrated and irreplaceable organization of scientists, executives, engineers, and skilled workers." General Groves, who was in charge of the Manhattan District, also very forcefully pointed out the necessity of the aid of these various and sundry contractors. We can hardly see how the Congress could have done of erwise than to have fully recognized the important contribution these operating contractors had played and would continue to play in the development of atomic energy as is shown by the prominence given their testimony before these congressional committees.

Section 4(c) (2) of the Atomic Energy Act (42 U.S.C.A.

Sec. 1804) expressly provided that:

"The Commission is authorized and directed to produce or to provide for the production of fissionable material in its own facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned [fol. 32] by the Commission. The Commission is also authorized to enter into research and development contracts authorizing a contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident to the conduct of research and development activities under such contracts."

It thus seems to us that the Congress intended, in establishing the tax exemption, that the term "activities" used

in this exemption should include the operating contractors. These operating contractors constituted the overwhelming number of employees in developing this great scientific development. If the exemption provision was limited as contended for by the Commissioner of Finance and Taxation it would be virtually meaningless, since the activities at all these large atomic energy installations were being conducted through operating contractors, and a specific statutory immunity in behalf of the Commission as a governing body was not necessary to exempt it from taxation. These contractors represent the great share of the total. expenditures made by the Commission and they constitute the major portion of this nation atomic energy program. Congress could hardly have used language that more aptly describes these operations than the language it used-"activities" of the Commission, Section 9(b). This Section prohibits - of the "activities" of the Commission in any [fol. 33] manner or form. The evident intent was to prohibit states and local governments from imposing a tax burden upon the farflung and continuing activities of the atomic energy program regardless of the means by which they should be carried on. One of the essential activities of the Commission in the maintenance and operating of its facilities is the procurement of supplies.

Presumptively, Congress does not pass or enact useless legislation. What was the purpose of immunizing "The Commission, and the property, activities, and income of the Commission?" These are exempt from taxation under the doctrine of implied immunity. Congress presumably knew that in recent years the courts were not applying the doctrine of implied immunity in various instances where the Government eventually bore the tax. It therefore seems clear that Congress did not intend to leave this question to the Courts but instead legislated on the question in such language as to cover all activities, etc., of the Government-owned instrumentalities.

All the cases refusing to apply the doctrine of implied immunity contain some such statement as: "save as Congress may act to remove them" or "unaided by congressional legislation". All of which clearly imply that if the immunity claimed was aided by congressional legislation, the courts would so apply the immunity sought.

[fol. 34] We gather from Footnote 7 in the Bismarck case,

supra, that when such exemptions are made by Congress that the purpose of these exemption statutes should be broadly construed in favor of the exemption. And the Supreme Court of the United States in Pittman v. Home Owners' Loan Corporation, supra, said this:

"We think that this term, (referring to loans) in order to carry out the manifest purpose of the broad exemption, should be construed as covering the entire process of lending, the debte which result therefrom and the mortgages given to the corporation as security."

The term "activities" not being defined by the Act, must be given its usual and ordinary meaning. Webster's New International Dictionary defines the word "activity" as "natural or normal function or operation; as, the activity of a volcano." Another significant dictionary definition is: "The state of action, doing; an exercise of energy or force; an active movement or operation; a physical or gymnastic exercise, an agile performance." And Crabb's English Synonyms says: "Activity respects one's transactions."

The word "activity or activities" of course as applied to various things has various meanings but the ordinary accepted meaning of the term when applied to any particular thing is that it covers everything that the individual or the corporation does. It is so broad that it reaches a circumference of all the acts or doings of a corporation or an [fol. 35] individual. It seems to us that Congress in using this term in this exemption clause did so advisedly and for the purpose of covering everything that the Commission did. By using such a broad term, it of course was not necessary to set out specific instances of different things that the Commission did so as to exempt them because the word activities covered all of these things. We are, therefore, of the opinion that in view of this congressional legislation, the taxes in question reginvalid as an unconstitutional intrusion by the State upon the performance of Federal functions. The cases are therefore reversed and a judgment will be entered here for the refund of the taxes sued for. The taxes fall directly upon activities which the Commission is carrying on through its cost reimbursement contractors.

The exemption in Section 9(b) of the Act was intended to

protect such activities,

Mr. Justice Gailor and Mr. Justice Tomlinson concur in the above opinion. The Chief Justice and Mr. Justice Prewitt dissent for the reasons stated in a dissent of the Chief Justice.

(S.) Hamilton S. Burnett, J.

[fol. 36]

OPINION OF SUPREME COURT ...

Davidson Equity (3 Cases)

ROANE-ANDERSON COMPANY

VR.

Sam K. Carson, Commissioner of Finance and Taxation, etc.

CONCURRING OPINION

These cases would be controlled, and the propriety of the levy of the sales tax established, by the decisions of the Supreme Court of the United States in Alabama vs King & Boozer, 314 U. S. 1, and Curry vs United States, 314 U. S., 14, 86 L. ed., pp. 3 and 9, except for the Act of Congress creating the Atomic Energy Commission and exempting it, its properties and activities from state and local taxation in language which is all-inclusive (42 U.S.C.A., 1951 Supplement, Section 1809 (b)):

"The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

No question is made of the authority of the Congress [fol. 37] to make the exemption from State and local taxation, and as I define the status of the Complainant operating corporations, Roane-Anderson Company, Carbide and Carbon Chemicals Corporation, and Diamond Coal Mining Company, they are independent contractors who have authority to act as purchasing agents for the Atomic Energy Commission in carrying out the experimental projects at Oak Ridge, Tennessee.

We have defined the Tennessee sales tax as a privilege tax upon retail sales (Hooten vs Carson, et al, 186 Tenn., 282) to be paid by the purchaser (Code sec. 1328.26), but if the purchaser, as a disclosed principal, purchases through an agent, the tax is still upon the purchaser, who in the present case, has been exempted from payment of the tax by Act of Congress.

It is the Act of Congress and the all-inclusive exemption of the Atomic Energy Commission from all state and local taxation that distinguishes the position of the contractors in the present case from those in the Alabama cases cited, supra. In Alabama vs. King & Boozer, supra, in the course

of the opinion on page 6, 86 L. ed., it was stated:

"Congress has declined to pass legislation immunizing from state taxation contractors under 'costplus' contracts for the construction of governmental projects."

[fol. 38] And in setting out the contract of the United States with the contractors, it was stated to be a term of the contract that the Government undertook to reimburse the contractors,

ditures for all supplies and materials and 'state or local taxes . . . which the contractor may be required on account of his contract to pay.' " (p. 7.)

In the present case, as stated, the Congress in allinclusive terms has exempted the Atomic Energy Commission from the payment of all local and state taxation.

My reasons for agreeing with the conclusions reached in the opinion of Justice Burnett, are sufficiently clear from this statement, and no elaboration would serve any useful purpose.

(S.) Gailor, J.

[fol. 39]

Davidson Equity

Davidson Equity /

ROANE-ANDERSON COMPANY

VS.

Sam K. Casson, Commissioner, etc.

and

WILSON-WEESNER-WILKERSON COMPANY

VS.

SAM K. CARSON, Commissioner, etc.

and.

CARBIDE AND CARBON CHEMICALS CORPORATION

VS.

SAM K. CARSON, Commissioner, etc.

and

DIAMOND COAL MINING COMPANY

VS.

SAM K. CARSON, Commissioner, etc.

DISSENTING OPINION

I reach a definite conclusion, after full consideration of the record and argument of counsel, that the appellants are "independent contractors" and cannot claim immunity from the state retail sales and use tax. The opinion of Mr. Justice Burnett is well-nigh conclusive of that question and with his conclusion I concur. But I am unable to agree [fol. 40] with his final conclusion that they are exempt from the tax upon theory that they are so much a part of a governmental agency, "The Atomic Energy Commission", that their purchases of materials constitute the "activities" of such governmental agency.

The insistence of able counsel for the appellants is that these contractors, who have been employed to serve the Atomic Commission are exempt from taxation by the express terms of Section 9(b) of the Atomic Energy Act, which reads as follows:

"In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer [fol. 41] District or their agents. In any such case, any benefit accruing to the state or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxa-tion in any manner or form by any state, county, municipality, or any subdivision thereof."

I can conceive of no theory or premise upon which tobase a conclusion that the appellants come within the four corners of the above statute if they are properly classified as independent contractors. It is not only conceivable, but quite consistent with reason, that agents of the Commission could rightfully claim exemption from taxation on the ground that whatever they do, or contract to do, must be adjudged as an activity of the Commission. But even where contractors claim to be agents the Congress should, to avoid doubt and confusion, specifically declare an exemption. In a legal sense, the appellants are not agents of the Atomic Commission.

The argument is made that we should by sheer inference hold that the Congress intended to exempt contractors from the tax. There is nothing in the Act exempting them and this Court should not undertake to apply to them the [fol. 42] doctrine of implied immunity. No one questions

the generally accepted principle, that the possessions, institutions, and activities of the Federal government are not subject to any form of state taxation in the absence of express Congressional consent. U. S. v. County of Allegheny, 322 U. S. 174, 88 L. ed. 1209.

It is undoubtedly true that the Congress has the power to protect all governmental agencies and instrumentalities from state taxation. But it is a far-reaching and dangerous doctrine to hold that the authority of a sovereign state to levy a tax can be nullified upon the theory of implied delegated immunity. It is manifestly unsound to hold that Congress intended to deny to the state its right to levy a constitutional tax upon business enterprises furnishing supplies to a Federal agency merely because it may possibly east upon the Government some economic burden.

The argument is made that unless the Congress meant to exempt contractors in its use of the word "activities", the statutory exemption is meaningless. I am unable to follow this contention. The Act to which reference is herein made (Section 9(b), Atomic Energy Act) exempts the "activities" of the Commission. The word "activities" should be construed as exempting property that the Commission has acquired. In other words, such resources, both tangible and intangible that may be in its possession and under its control which is devoted to the development of atomic energy. The Special Committee of Congress, [fol. 43] appointed to consider the said Act, made the following report:

"Section 9. Property of the Commission.

"The Commission is to take over all resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse states and municipalities for loss in taxes incurred through its acquisition of property."

There is no reason for this Court to construe "activities" as providing for an exemption from state taxation when the Congress refused to adopt an amendment which would have expressly exempted contractors from such a tax. In Stand-

ard Oil Co. of La. v. Fontenot, 4 So. (2d) 634, 642, it is pointed out by the Court:

"Prior to the passage of Public Act 588 of the 76th Congress, 54 Stat. 265, the language therein, which would have made contractors agents of the government and would have exempted them from all taxes—federal, state, and local,—was stricken therefrom in the House [fol. 44] and was concurred in by the Senate. Cong. Rec., Vol. 80, part 7, pages 7532-7535, Amd't. 1205, H. B. 8438; Cong. Rec., Vol. 86, part 7, pages 7646-7648." (Emphasis supplied.)

In Alabama vs. King & Boozer, 314 U. S. 1, 86 L. Ed. 6, the Court, speaking through Mr. Chief Justice Stone, says:

"Congress has declined to pass legislation immunizing from state taxation contractors under 'cost-plus' contracts for the construction of governmental projects. Consequently, the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and the appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the national government."

There should be no disagreement upon the proposition that the word "activities" as used in Section 9(b) should be broadly construed. It should be so construed in all those cases where the Congress has expressly declared that a state tax is such a burden upon the particular instrumentality that it amounts to an impairment of the power of government. The contention of the state, while not disputing the foregoing proposition, is that the Court is not authorized to [fol. 45] extend the exemption by construction "so as to exempt an independent contractor from non-discriminatory, constitutional excise taxation." The correctness of this contention will not be seriously controverted in the face of the Congress's express refusal to provide for an exemption.

I cannot conceive that Congress would ever agree to an exemption of "contractors" from state taxation as contended for in the case at bar. Is it possible that the Congress, in exempting "activities" of a Federal bureau from

·liability for a state tax, intended thereby to exempt every person, firm or corporation who might do business with it pursuant to a written contract? I think not. If that is not an implied delegation of immunity, I don't know how to classify it. That the Congress never intended to provide an exemption in such circumstances is not only shown by the Congressional Record, as pointed out in Standard Oil Co. of La. v. Fontenot, supra, but also in Penn Dairies v. Milk

Control Com., 318 U. S. 261, 87 L. Ed. 748.

The country is now witnessing, and has for a number of years, the vast increase in the number of Federal agencies claiming immunity from state taxation under the specious plea that "we are the Federal government." They seek to extend the immunity, as illustrated by the present appeal, to all who may have a contract with them to render some form of service, or furnish them supplies of any kind. the plea is good it results that Congress has clothed them [fols. 46-4] with attributes of government which is superior to that of a sovereign state. The cases cited on the State's brief, and particularly Penn Dairies v. Milk Control Com., supra, are conclusive of the question that Congress has had no thought of thus paralyzing the taxing authority of State governments.

If, however, I am mistaken in this conclusion, and the State of Tennessee is powerless to collect its just revenues, we should no longer think of "state sovereignty" as it has been known in the country's history for more than a century and a half, but that sovereignty now exists at the wnim, and possible caprice, of agencies which are a law unto them-

selves.

In my opinion the appellants have no right to claim an exemption from the tax in question, in the absence of an express statutory provision, unless it plainly appears that it constitutes an encroachment upon, or interference with, the free exercise of governmental authority.

(S.) Neil, C.J.

Mr. Justice Prewitt concurs in this dissent.

[fol. 5] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65015

ROANE-ANDERSON COMPANY, a corporation organized and existing under the laws of the State of Tennessee, Complainant,

Sam K. Carson, Commissioner of Finance & Taxation of the State of Tennessee, with office at Nashville, Tennessee, and individually a citizen and resident of Davidson County, Tennessee, Defendant

ORIGINAL BILL-Filed November 14, 1947

The complainant Roane-Anderson Company shows to the Court the following facts:

[fol. 6] I

The complainant is a corporation duly organized and existing under the laws of the State of Tennessee, with its principal office at Oak Ridge in Anderson County, Tennessee.

The defendant Sam K. Carson is the duly appointed and acting Commissioner of Finance and Taxation of the State of Tennessee and as such was and is charged with the collection of all taxes under the Act of the General Assembly of the State of Tennessee known generally as Tennessee Retailer's Sales Tax Act, being Chapter No. 3 of the Public Acts of the year 1947 of the General Assembly of Tennessee; and said defendant promptly entered upon the discharge of his responsibility as collecting officer under said Act and the payments hereinafter described were made to him and received by him in his said capacity.

This is a suit brought to recover certain amounts asserted by said defendant to be due from the complainant under the said Tennessee statute, which amounts the defendant compelled the complainant to pay, although requirement of payment thereof was illegal, complainant not being liable for said tax. The said statute requires the tax to be paid by the 20th day of each month, and this suit is brought for the further purpose of obtaining the adjudication of this Court that said statute and the tax levied thereby do not apply to the complainant in respect to trans-

actions hereinafter described, so that in the future it shall not be necessary for the complainant to bring a suit enterment in order to protect its rights.

[70l.7] II

On February 15, 1944, the complainant entered into a contract with the United States of America, being Contract No. W-7401-ENG-115. Sail contract was entered into by the United States Government as an incident to the prosecution of World War Two then in progress; the scope of the action contemplated under said contract was important at that time and remains important at this time, in relation to matters of extremely grave concern to the national welfare, security and defense. Complainant files herewith as Exhibit "A" and by such reference the same is made a part hereof, a full and accurate copy of said contract with the additions thereto and modifications thereof which have become effective from time to time.

III

Complainant promptly entered upon the performance of the said contract, and has ever since been engaged therein and is so engaged at the present time.

IV

The Act of the Congress of the United States known as the "Atomic Energy Act of 1946" (42 U. S. C. A. 1801, et seq.), which became a law in the latter part of the year 1946, duly provides for the transfer of all properties, responsibilities, duties, rights, etc., from the Governmental instrumentality which had exercised jurisdiction over and supervision of the operation of the area within Roade and [fol. 8] Anderson Counties, Tennessee, known as the Clinton Engineer Works. The Governmental instrumentality through which said work had been carried on until the transfer to the Atomic Energy Commission was known as Manhattan Engineer District. It is in said area that the complainant maintains its offices and carries on its work under said contract.

The full transfer of properties, authorities, rights, obligations, etc., of the Manhattan Engineer District to the

Please refer to Roane-Anderson Exhibit P.

Commission created under the Atomic Energy Act of 1946 is provided for and directed by said Act of Congress. Acting pursuant to and in full discharge of the provision of said Act relating thereto the President of the United States has duly issued Executive Order No. 9816 dated December 31, 1946 which has brought about the full transfer intended by Congress under the terms of said Act. Pursuant to and as a result of the said executive order of the President the contract dated February 15, 1944, above referred to became a contract between the Atomic Energy Commission, an instrumentality of the United States of America, and the Complainant, and this change occurred as of indinght December 31, 1946.

V

As a necessary and integral part of the work performed under and course of action required by said contract with the Atomic Energy Commission, all of which work and action was and is an essential and an integral part of the activities of the Atomic Energy Commission in the interest of national welfare, security, and defense, the complainant has continuously purchased property of the kind which is [fol. 9] described as being taxable under the said Tennessee Retailer's Sales Tax Act of 1947, and will continue to purchase such property in the performance of said contract. The number of such purchases which have been made by the complainant since the effective date of said Act has been very considerable and it would unduly lengthen this bill and tax the patience of the Court, and it is wholly unnecessary to enumerate and specifically describe each of the purchases which have been asserted by the defendant to entitle him to collect the tax. All of the properties so purchased and to be purchased by the complainant under its said contract have been or will be used by the United States and this complainant in the performance of the activities of the Atomic Energy-Commission and pursuant to the terms of the contract hereinabove mentioned.

On October 15, 1947 the complainant paid the defendant \$1,633.57, which sum was paid to the defendant by reason of the position taken by him as to the applicability of the provisions of the said Tennessee Retailer's Sales Tax Act to the complainant. Of the total amount of said payment, only the sum of \$1,264.98 is specifically the object of re-

covery by the complainant in this case, which amount of \$1,264.98 was the part of said payment claimed by defendant to be payable as the so-called "Use Tax" for the month of September 1947. All of the said purchases by complainant were handled in compliance with the same procedure and under the same arrangement in the case of each item that was purchased. Each of said purchases was consummated through the use of forms, and under the express provisions of and according to the procedure shown by Exhibit "B" [fol. 10] filed herewith and made a part hereof, which are actual photostated copies of the original records in the possession of the complainant, the pages of which Exhibit B are as follows:

Page 1. Complainant's purchase requisition No. B-280.

Page 2. Complainant's purchase order No. 40198.

Page 3. Reverse side of Page 2 of Exhibit B.

Page 4. Invoice of Motorola-Inc.

Page 5. Complainant's receiving report No. 106328, bearing the signature of the complainant's receiving officer and also bearing the approval of a representative of the Atomic Energy Commission.

Page 6. Complainant's chee No. 50890 in payment for

the property purchased.

Page 7. Reverse side of page 6 of Exhibit B.

Page 8. First page of Voucher No. 40-7528 submitted by complainant to the United States.

Page 9. Second page of Voucher No. 40-7528.

Page 10. Third page of Voucher No. 40-7528.

Page 11. Reverse side of page 8 of Exhibit B.

By check No. 84303 the United States of America reimbursed this complainant for its expenditures made as aforesaid and which appear in the voucher submitted by complainant and appearing hereto as pages 8, 9, 10 of Exhibit B.

Complainant avers that in each and every instance wherein it purchased from vendors without the State of Tennessee, the title thereto became vested in the United States of America at the moment that title passed from the

² Exhibit B to the original bill consists of Roane-Anderson Exhibits 4, 5, 7, 11, 14, 15, 16, and 17, to which please refer.

vendor. Under Article IX, paragraph 1 of the contract [fol. 11] dated February 15, 1944, it is provided as follows:

"Title to all materials, tools, machinery, equipment and supplies which the Contractor purchases in accordance with Article I of this Contract and for which the Contractor shall be entitled to reimbursement under Article V shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be."

Complainant avers that the uniform and unvarying practice and custom of complainant and the Atomic Energy Commission in the performance of their said contract was that title to all procurements vested in the United States of America at the moment of acquisition from the vendor, and from that moment, in every instance of a purchase, the property was treated as being the property of the United States Government. No insurance for the protection of such purchased property was taken out, in accordance with the policy of the United States Government which dispenses with insurance on Government property. The risk of loss of the property rested at all times upon the United States Government and not upon the complainant.

The complainant is expressly designated and declared by the said contract to be the agent of the United States for the performance of the above contract. Article I, Section

3, thereof, provides as follows:

[fol. 12] "In the operation of the facilities under this contract, and in the procurement of any and all supplies, materials, equipment necessary to the performance of the work hereunder, the Contractor shall act as Agent for the United States of America, it being understood and agreed, however, that all personnel and labor shall be and remain for all purposes the employees of the Contractor, exclusively, it being understood and agreed that the duties and functions of all such persons will be performed under the sole supervision and direc-

tion of the Contractor; provided, however, that employees engaged in the fire, guard and police patrols and forces shall perform their respective duties in accordance with the instructions and under the supervision of the Contracting Officer or his duly authorized representative."

VI

Complainant particularly desires to call to the attention of the Court the provisions of Section 9(b) of the Atomic Energy Act of 1946 reading as follows:

"In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State of local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, County municipality, or any subdivision thereof."

The Complainant alleges that all of its transactions and all of its acts entered into and performed under the contract above mentioned are activities of the Atomic Energy Commission within the intendment and purpose of Section 9(b) [fol. 13] of the Atomic Energy Act of 1946, and that if the Tennessee Retailer's Sales Tax Act is construed as being applicable to the activities or transactions which are herein questioned that Act is invalid as applied because it is repugnant to the Atomic Energy Act of 1946 including Section 9(b) thereof and if construed as applicable to the activities

or transactions as above mentioned is invalid as applied because it is repugnant to the Constitution of the United States.

VII

The said tax paid to the defendant as above averred was paid under protest and duress and if it had not been paid process, either actually issued and in the hands of an officer, or in the defendant Commissioner's hands would have been levied against the complainant's property and sufficient thereof for the payment of said tax would have been seized. Said payment was the only way of averting such action. Said payment was wholly involuntary and was expressly made without prejudice to any and all rights of complainant to the recovery thereof and to establish immunity from and non-liability for such tax. The defendant Commissioner expressly accepted the payment of said tax upon all the conditions attached thereto, as just averred, and has expressly stated and agreed that such payment would leave available to the complainant the full right to sue for the recovery thereof without meeting the defense of voluntary. payment, and that such defense would not and could not be asserted.

The premises considered, the complainant prays:

[fol. 14] 1. That process issue and be served upon the defendant and that he be required to answer or otherwise plead to this original bill but not under oath, his oath being expressly waived.

2. That a judgment be entered against the defendant Commissioner which will set forth that the transactions of the complainant, described in the Toregoing original bill, and like transactions occurring since those described above, and occurring currently and in the future, are not subject to the tax provided for in the Tennessee Retailer's Sales Tax Act of 1947, and which judgment shall also entitle the complainant to have and recover of the defendant the sum of \$1,264.98 being the amount collected by the defendant from the complainant as a Use Tax under said Act.

3. That upon the completion of the hearing and decision by the Court, a permanent injunction be granted the complainant which shall restrain the defendant and his successors in office from seeking to apply the said Act to the transactions of the complainant of the nature above de-

scribed, and from seeking to recover from the complainant any alleged use taxes provided for in the said Act.

4. For such other and general relief as the complainant

may be entitled to.

Roane-Anderson Company, By S. Frank Fowler, Solicitor. Cates Fowler, Long & Fowler, 1412 Hamilton Bank Building, Knoxville, Tennessee.

[fol. 15] Duly sworm to by S. Frank Fowler. Jurat omitted in printing.

[fol. 16]. Cost Boxp (Omitted in Printing)

[fol. 17] IN THE CHANCERY COURT OF DAVIDSON COUNTY

"SUBPOENA TO ANSWER AND RETURN

STATE OF TENNESSEE

To the Sherift of Davidson County, Greetings:

We command you to summon Sam K. Carson, Commissioner of Finance and Taxation of the State of Tennessee, and Individually, if to be found in your County, to appear in person or by attorney before the Chancellor of Part Two of our Chancery Court at Nashville, on the 1st Monday in December, 1947, it being the 1st day of December, 1947, there and then to answer the Original Bill of Complaint of Roane-Anderson Company, a corporation, vs. Sam K. Carson, Commissioner, etc., and further do and receive what our said Court shall consider in that behalf; and this you shall in nowise omit, under the penalty prescribed by law. Herein fail not, and have you than and there this writ.

Witness, Jas. E. Covington, Clerk and Master of our said Chancery Court, at office in the Courthouse at the City of Nashville, Tennessee, this first Monday in October, 1947 and the 172nd year of American Independence.

Jas. E. Covington, Clerk and Master, By Emily Lard, D. C. & M.

Sheriff's Return:

Came to hand same day issued and Executed by Roy Beeler, Attorney General accepting service for the Defendant.

November 17, 1947.

Garner Robinson, Sheriff, By J. H. Alexander

[fol. 18] Due and legal service of the within process, with copy of the Bill, acknowledged on behalf of the defendant Sam K. Carson, Commissioner of Finance & Taxation of the State of Tennessee, this November 17, 1947.

Roy H. Beeler, Attorney General

[fol. 19] IN THE CHANCERY COURT OF DAVIDSON COUNTY

In Part 2 of the Chancery Court, Davidson County, at Nashville, Tennessee

ROANE-ANDERSON COMPANY, Complainant

VS.

SAM K. Carson, Commissioner of Finance and Taxation of the State of Tennessee, Defendant

Answer of Defendant-Filed January 28, 1948

Comes the defendant, Sam K. Carson, Commissioner of Finance and Taxation of the State of Tennessee, and for answer to the original bill filed against him in this cause does say:

T

Answering Section I of the original bill, defendant says:

It is admitted, as alleged in the original bill, that complainant is a corporation organized and existing under the laws of the State of Tennessee, with its principal office at Oak Ridge, in Anderson County, Tennessee. It is admitted, as alleged in the original bill, that defendant Sam. K. Carson, is the duly appointed and acting Commissioner Finance and Taxation of the State of Tennessee, and charged with [fol. 20] the collection of the Tennessee Retailer's Sales Tax.

It is denied, as alleged in the original bill, that defendant acted illegally in requiring complainant to pay the tax for which it sues. It is denied, as alleged in the original bill, that complainant is entitled to a declaration to the effect that the Tennessee Re-ailer's Sales Tax does not apply to it in respect to transactions of the character described in the original bill.

To the contrary, defendant's action in requiring complainant to pay the tax for which it sues was legal and valid, and complainant is not entitled to a declaration to the effect that the Tennessee Retailer's Sales Tax does not apply to complainant in respect to transactions of the character described in the original bill.

TT

Answering Section II of the original bill, defendant says:

Defendant admits, as alleged in the original bill, that on February 15, 1944, complainant enteredants a contract with the United States of America, being contract No. W-7401-ENG-115, as an incident to the prosecution of World War Two, the scope of which contract was important at that time and remains important now in relation to matters of extremely grave concern to the national welfare, security and defense. Defendant supposes that Exhibit "A" is a full and accurate copy of said contract with the additions thereto and modifications thereof which have become effectfol. 21] tive from time to time, but not knowing whether this is true neither admits nor denies this allegation but calls for strict proof thereof.

Ш

Answering Section III of the original bill, defendant says:

Defendant admits that at about the time alleged in the original bill complainant entered upon the performance of a contract with some agency or instrumentality of the United States and has been engaged therein ever since. As stated in the foregoing answer to Section II of the original bill, defendant is not advised as to the contents of said contract, so, does not admit that complainant entered upon the execution of the contract, Exhibit "A", but calls for strict proof thereof.

IV

· Answering Section IV of the original bill, defendant says:

Defendant admits the allegations of Section IV of the original bill to the effect that the Atomic Energy Act of 1946, which became a law in the latter part of the year 1946, and which duly provides for the transfer of all properties, duties and rights from the Manhattan Engineer District, a

governmental agency, to the Atomic Energy Commission, was put into execution by executive order of the President of the United States on December 31, 1946. He admits, as alleged in the original bill, that pursuant to and as a result of said executive order the contract between the complainant [fol. 22] and the Atomic Energy Commission, an agency of the United States Government.

V

Answering Section V of the original bill, defendant says:

Defendant admits that complainant has purchased tangible personal property taxable under the Tennessee Retailer's Sales Tax Act in carrying cut its contract with the Atomic Energy Commission, and admits that complainant will continue to purchase such property in the performance of such contract. It is denied, however, as alleged in said Section V that the property so purchased and to be purchased by the complainant under its said contract has been or will be used by the United States. To the contrary of this, defendant avers that under the contract, Exhibit "A", said property so purchased and to be purchased is to be used by the complainant.

Defendant avers that complainant, not the Atomic Energy Commission, was the purchaser, importer, storer and user of all the tangible personal property, the sale or use of which was a measure of the taxes involved in this cause.

It is admitted that on October 15, 1947, complainant paid defendant \$1,633.57 by reason of defendant's insistence that the sales tax applied to complainant; that of the total amount paid, \$1,264.98 was claimed by defendant to be payable as use tax owed by the complainant for the month of September, 1947. It is not admitted that this amount of \$1,264.98 constituted all of the use tax liability of complain[fol. 23] ant but defendant does say that he did insist that complainant owed at least this amount.

In answer to the allegations in said Section V that the purchases by complainant were handled in compliance with the same procedure and under the same arrangement in the case of each item that was purchased, and that said purchases were consummated through the use of forms according to the procedure shown by Exhibit "B", defendant says that he has no knowledge as to the truth of these

allegations and accordingly neither admits nor denies the same but calls for strict proof thereof.

Defendant, for further answer to the allegations of Section V, denies, as alleged in the original bill, that in each instance wherein complainant purchased tangible personal property from vendors within or without the State of Tennessee the title became vested in the United States of America at the moment title passed from the vendor.

To the contrary of this, defendant would show that according to the terms of Article IX, Paragraph 1 of the contract, Exhibit "A", which is copied in the original bill, the title to said property remains in the complainant and only vests in the Government "at such point or points as the Contracting Officer may designate in writing." (See Article IX, paragraph 1, Exhibit "A".)

For answer to the averment in said Section V that it is the uniform practice and custom of complainant and the Atomic Energy Commission, in the performance of said contract, to treat title to all procurements as vested in the United States of America from the moment of [fol. 24] acquisition from the vendor, the defendant avers that if this practice and custom exists, which is denied, it is contrary to Article IX, Paragraph 1 of Exhibit "A", and unlawful. Any such practice or custom on the part of the employees of the Atomic Energy Commission would be beyond their power and void.

Article IX, paragraph 1 of Exhibit "A" provides that the right of final inspection and acceptance or rejection is reserved to the contracting officer and is to be exercised by the contracting officer by written notice of acceptance or rejection. Defendant avers that any practice or custem engaged in or sought to be established by the employees of the Atomic Energy Commission contrary to their plain duty under these terms of the contract just referred to, would be illegal and void, and could not have the effect of vesting title in the United States prior to its inspection and written acceptance of the tangible personal property.

Answering said Section V further, it is denied that complainant is the agent of the United States of America in the procurement of tangible personal property necessary to its discharge of its part 8f said contract. It is denied that said contract, Exhibit "A", when read in its entirety and construed in the light of all its provisions has the

effect of constituting complainant an agent of the United States Government.

To the contrary, it appears from the whole of said contract, Exhibit "A", that complainant is an independent

[fol. 25] contractor and not an agent.

Defendant avers that the complainant is denominated an agent in said Article I, section 3 of said contract, not for the purpose of endowing it with the rights and powers incident to an agencyship but to bring complainant within the constitutional and statutory exemption from taxation available to the Atomic Energy Commission as an instrumentality or agency of the United States.

Since the relationship of principal and agent is not created by said contract when construed as a whole, complainant is not made the agent of the United States by

the bare naming of it as such in said contract.

In this connection, defendant avers that it is beyond the power of the Atomic Energy Commission, itself an agency or instrumentality of the United States of America, to undertake to delegate its agency by constituting complainant an agent for the United States of America. Defendant avers that if said contract, Exhibit "A", is subject to the construction contended for by complainant, in this regard, then same is ultra vires and void.

VI

Answering Section VI of the original bill, defendant says:

It is true that Section 9(b) of the Atomic Energy Act of 1946 exempts the property, activities and income of the Atomic Energy Commission from State, county, or

municipal taxation in any form.

[fol. 26] It is denied, however, that this exemption of the activities of the Atomic Energy Commission, itself an agency or instrumentality of the United States Government, operates to exempt the activities of complainant, a private corporation operating for profit.

In this connection, it is denied that the use taxation of the acquisition of tangible personal property by the complainant under circumstances which would render complainant liable for use taxes is illegal because repugnant to the

Constitution of the United States.

To the contrary of these averments, defendant would

respectfully show to the Court that it has long been recognized by the Supreme Court of the United States that the economic burden incident to the payment of use taxes by a contractor with the United States Government must be treated like any other business expense incident to the operations of such a contractor and, to the extent that such taxes increase the cost of the operation, the economic burden thereof may be borne by the United States Government without violating its constitutional tax immunity. This philosophy of governmental exemption from tax liability is exemplified in the cases of Alabama v. King and Boczer, 314 U. S. 1, and Curry v. United States, et al., 314 U. S., 14.

However, immediately after the pronouncement by the Supreme Court of the United States of the principle just mentioned, certain administrators of certain departments of the United States Government commenced to undertake [fol. 27] to exonerate those with whom they contracted from liability for taxes by resort to various forms of contract wording. Apparently the practice most commonly resorted to in an effort to circumvent and evade the holdings of the Supreme Court in Alabama v. King & Boozer and Curry v. United States, et al. is that of entering into a contract, the terms of which denominate the contractor an agent, with the hope that theraby the cloak of constitutional and statutory immunity which attached to the department or commission will be extended to the contractor.

Defendant avers that this accounts for the wording of the contract in Exhibit "A". There is no other reason for the language used in Article I, Section 3. All of the duties and obligations of the respective parties being outlined in the contract in full detail, it was annecessary to characterize the contractor as an agent unless this be done for the express purpose of throwing the cloak of constitutional and statutory immunity over the contractor contrary to the expressed philosophy that increased cost due to taxation should not be avoided merely because the burden thereof ultimately might fall on the United States Government.

No trickery with words can alter the fact that the complainant is a private corporation composed of intelligent, acquisitive businessmen, who are engaging in a privilege in Tennessee for which all others under similar circumstances must pay the privilege tax provided by the Tennessee Retailer's Sales Tax Act. No legal legerdemain can make a "governmental agency" out of this private corporation for profit.

[fol. 28] VII

Answering Section VII of the original bill, defendant says:

Defendant admits that complainant paid said tax under protest and is entitled to resort to the remedy provided by Section 1790 et seq. of the Code of Tennessee.

VIII

By way of conclusion to this answer, defendant denies that complainant is entitled to a judgment as prayed for in the original bill. He denies that complainant is entitled

to a judgment for any amount.

Defendant denies that complainant is entitled to a permanent injunction of the character prayed for in the original bill or of any other character. He would respectfully show to the court that it is beyond the power of the court to grant an injunction of the wort prayed for in this character of suit, this being expressly so provided by Section 1795 of the Code of Tennessee. More than this, he would respectfully point out that there are no averments in the original bill to sustain the prayer for a permanent injunction against him and his successors in office. It is, not made to appear in the original bill that there is any reason to believe that the defendant or his successor in office would undertake to collect use taxes from complainant contrary to any final decree which might be made in this suit, declaring the meaning and effect of the contract and the statutes involved.

[fol. 29] Defendant here and now denies each and every allegation of the original bill not hereinbefore specifically admitted and does pray to be dismissed with his just cost.

Roy H. Beeler, Attorney General; Wm. F. Barry, Solicitor General; Harry Phillips, Assistant Attorney General; Allison B. Humphreys, Jr., Advocate General. [fol. 30] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65015

ROANE-ANDERSON COMPANY

VS.

SAM K. CARSON, Commissioner of Finance and Taxation

and

No. 65164

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation

ORDER CONSOLIDATING CAUSES WITH RESPECT TO PROOF—
June 9, 1949

By consent of the parties and upon their joint application, it is ordered that these causes are consolidated for the purpose of the taking and introduction of evidence, so that a single set of depositions, exhibits and other papers constituting the proof in the causes shall be filed with the Clerk, and the same shall be used in both of the above entitled causes.

J. C. Dale, Jr., Special Chancellor.

fine of

O. K. S. Frank Fowler, Solicitor for Complainants. Allison B. Humphreys, Jr., Solicitor for Defendant.

[fol. 31] In the Chancery Court of Davidson County No. 65015

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation

ORDER OF REVIVAL-August 31, 1949

Came the parties and suggested to the court that Sam K. Carson no longer occupies the position of Commissioner of Finance & Taxation of the State of Tennessee, and that

Evans. Wherefore, upon motion of the parties and by their mutual consent, it is Ordered first, that this cause be in all respects revived and continued against James Clarence Evans, Commissioner of Finance & Taxation of the State of Tennessee, and second, that in the event this cause is not concluded during the tenure of office of said Evans, the same shall be revived and continued in all respects against the successor or successors in office of the said Evans, without the necessity of any further application by a party or order by the Court.

O. K. S. Frank Fowler, Solicitor for Complainant. Al-

lison B. Humphreys, Jr., Solicitor for Defendant.

[fol. 32] IN THE CHANCERY COURT OF DAVIDSON COUNTY

Rule No. 65015

ROANE-ANDERSON COMPANY

VS.

SAM. K. CARSON, etc.

ARGUMENT AND SUBMISSION

This cause was heard before Alfred T. Adams, Special Chancellor, September 13, 1949 and former days of the term and was taken under advisement on that date.

Alfred T. Adams, Special Chancellor.

[fol. 33] IN THE CHANCERY COURT OF DAVIDSON COUNTY

ROANE-ANDERSON COMPANY

VB

Sam K. Carson, Commissioner of Finance & Taxation

ORDER ALLOWING INTERVENTION - May 24, 1950

This cause came on to be heard this date upon the petition of the United States for leave to intervene in the above cause, and was argued by counsel.

Upon consideration whereof, the Court doth Order and

Decree that the United States be and it hereby is granted

leave to intervene in this cause.

It is further Adjudged, Ordered and Decreed, that the petition for intervention filed herein on behalf of the United States be and the same is filed in this cause as the intervening petition of the United States.

Alfred T. Adams, Special Chancellor.

[fol. 34] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65015

In the Chancery Court at Nashville

Part II

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation

PETITION OF THE UNITED STATES FOR LEAVE TO INTERVENE AND INTERVENING PETITION—Filed May 23, 1950

The United States of America, by its attorneys, Jack Howard McGrath, Attorney General of the United States, Theron L. Caudle, Assistant Attorney General of the United States, and Berryman Green as Special Assistant to the Attorney General, respectfully alleges that it has an interest in the matter in litigation, and in the success of the complainant, Roane-Anderson Company, and, therefore, desires to become a party to the litigation by uniting with the complainant in furtherance of its claims, and as grounds therefor alleges:

T

That the intervention for which leave is prayed herein is authorized by the Attorney General of the United States at the request of the Atomic Energy Commission.

II

That the Intervenor adopts and incorporates herein by reference all of the allegations and conclusions contained in the original bill herein. That by reason of the facts so alleged, your petitioner has an interest in this case which it is entitled to protect by intervention herein.

Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene in this action; that an order be entered allowing intervention; and that this Petition for leave to Intervene be considered and adopted by this Court as the Intervening Petition of the United States.

Your petitioner further prays that the judgment prayed for by the complainant in his original bill be entered and that the Court grant such other and further relief as it may

deem proper.

A Howard McGrath, Attorney General; Theron L., Caudle, Assistant Attorney General, by Berryman Green, Attorney for Petitioner, United States of America. [fol. 36] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65015

ROANE-ANDERSON COMPANY

VS.

SAM K. CARSON, Commissioner of Finance & Taxation, etc.

and

No. 65164

WILSON-WEESNER-WILKINSON Co.

VS.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

and

No. 65014

CARBIDE & CARBON CHEMICALS CORPORATION.

VS.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

and

No: 65163

DIAMOND COAL MINING COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

OPINION-Filed May 24, 1950

These four cases were brought to test whether or not the Tennessee Retailer's Sales Tax Act applies to purchases and uses of tangible personal property by complainants. They were heard together, since they involved the same legal questions.

[fol. 37] The complainants, Roane-Anderson Company and Carbide and Carbon Chemicals Corporation are cost-plus-fixed-fee contractors which operate Oak Ridge and the Atomic Energy Plant owned by United States of America under contracts with Atomic Energy Commission, which was created pursuant to the Atomic Energy Act of Congress, August 2, 1946 (Public Law 585—79th Congress, 42

U.S.C:A. 1801, et seq:).

The complainant, Wilson-Weesner-Wilkinson Company, is a corporation doing business in the State of Tennessee and engaged in the sale of merchandise, some of which it sold to complainant, Roane-Anderson Company, and on which sale Wilson-Weesner-Wilkinson Company paid a o sales tax to the State of Tennessee. The complainant, Diamond Coal Mining Company, is a corporation engaged in business in the State of Tennessee and it sold coal to Carbide and Carbon Chemicals Corporation and paid the State of Tennessee assales tax on said sale. The purchases so made were used by the respective complainant purchasers in performance of their contracts with Atomic Energy Commission. The property so purchased is of the kind described as being taxable under the Tennessee Retailer's Sales Tax Act of 1947 and similar purchases will be made in the future and used in the performance of said contracts.

Roane-Anderson Company and Carbide and Carbon Chemicals Corporation purchased certain equipment in interstate commerce which was delivered to them at Oak Ridge and used by each in the performance of their respective contracts with the Atomic Energy Commission and they paid the State of Tennessee (se) taxes on said purchases. The property so purchased is also of the kind [fol. 38] described as being taxable by the Tennessee Act above referred to.

The payments of these taxes were made under protest and these suits were brought against the Commissioner of Finance and Taxation of the State of Tennessee, as authorized by law, to recover said taxes and a permanent injunction is sought to restrain the defendant and his successors in office from seeking to apply said Act to the transactions of the complainants as set forth and described in the respective bills.

Upon the hearing of these cases, the United States of

America tendered its petitions asking leave to intervene in

each case which by the Court is granted.

It is insisted by the complainants that the purchases of tangible personal property made by the complainants, Roane-Anderson Company, and Carbide and Carbon Chemicals Corporation, were in fact made by each of them for and on behalf of the United States of America as represented by the Atomic Energy Commission and that the application of said taxing statute is unlawful because it constitutes a tax by the State Government upon the Federal Government, which is not permitted. "The power to tax is the power to destroy."

The original contracts were executed on behalf of the United States of America by Manhattan Engineer District of the United States Army Corps of Engineers. These contracts together with amendments thereto are cost-plus-fixed-fee contracts similar in essential portions to the type of [fol. 39] contract used by the United States Government in

the prosecution of World War II.

The Atomic Energy Act of 1946 provides for the transfer of all properties, responsibilities, duties, rights, etc., from the Manhattan Engineer District of the United States Army Corps of Engineers, to the Atomic Energy Commission and pursuant to and in accordance with said Act, the President of the United States issued Executive Order No. 9816 effective December 31, 1946, which brought about the transfer provided for in said Act so that the Atomic Energy Commission became the governmental agency representing the United States of America in the work being performed under the contracts with Roane-Anderson and Carbide & Carbon.

The substitution of one governmental agency for another did not change the relationship of the contracting parties. The two contracts remained cost-plus-fixed fee contracts and the contractors are still independent contractors.

When Congress created the Atomic Energy Commission, it knew the contracts of Roane-Anderson and Carbide & Carbon were in existence and that the Atomic Energy plant at Oak Ridge, Tennessee was being constructed and operated by these independent contractors under the provisions of said contracts.

The Atomic Energy Act authorized the Conmission to perform the work and functions assigned to it by the Act or to have it done by others. The Commission elected to continue the operations at Oak Ridge under the contracts [fol. 40] entered into with Roane-Anderson and Carbide & Carbon by the United States Corps of Engineers rather than undertake the performance of the work with its own employees An explanation for this decision may be found in the Commission's report to the Congress.

The contracts provide that the Government can furnish materials and supplies and pay for them or the contractors can make purchases and the Government will reimburse the contractors. In the transactions involved herein, the contractors made the purchases. Uniformly, the contracts entered into by the contractors for the purchase of materials provided that they are "assignable to the United States Government."

The proof indicates that the details of making purchases and transferring personal property to the Government has not always been carried out as provided in the contracts. Nevertheless, the relationship and rights of the parties are determined by the provisions of the contracts and not by the unauthorized acts of their employees.

All purchases involved herein were made by the respective contractors and paid for by them from the bank accounts maintained by them as required by these contracts. It is true the money was furnished by the United States Government, but this was done pursuant to the provisions of the contracts:

The contracts provide that Roane-Anderson and Carbide & Carbon shall not pledge the credit of the United States of America.

Very able briefs have been filed by counsel representing [fol. 41] the parties hereto in which a number of questions are discussed, not dealt with in this opinion. However, the Court is of the opinion that the matters discussed herein are determinative of the issues involved and, there ore, discussion of other questions is deemed unnecessary.

The Tennessee Retailer's Sales Tax Act levies a tax on the vendor of personal property for the exercise of the privilege of engaging in the business of making sales in Tennessee and is not a tax upon the sales transaction nor is it a tax on the vendee.

This decision by the Supreme Court of Tennessee is conclusive and bitting.

Erie Railroad Co. vs. Tompkins, 304 U.S. 69.

Roane-Anderson and Carbide & Carbon are independent contractors engaged in business for profit under cost-plus-fixed-fee contracts with the Atomic Energy Commission and unless a change has been brought about by the enactment of the Atomic Energy Act, complainants are not entitled to the relief sought in these proceedings. The "fee" paid these contractors is not divulged.

Alabama v. King & Boozer, 314 U. S. 1; Curry v. United States, 314 U. S. 14.

"For the reasons stated at length in our opinion in the King & Boozer case, we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the Government, were not agents or relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the state law lays the tax upon them rather than the indi-[fol. 42] vidual with whom they enter into a cost-pluscontract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the King & Boozer case, by concession of the Government and on authority, the Constitution, without implementation by congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government."

Curry v. United States, supra.

The Government, to support its thesis that it was the purchaser, insists that title to the lumber passed to the Government on shipment by the seller, and points to the very extensive control by the Government over all purchasers made by the Contractors. It emphasizes the fact that the contract reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of \$500 or over could be

by the contractors only when approved in advance by the contracting officer; that the Government is reserved the right to approve the price, to furnish the materials itself, if it so elected; that that in the case of the dumber presently involved, the Government inspected and approved the lumber before shipment. From these circumstances it concludes that the Government was the purchaser. The necessary corollary of its position is that the Government, if a purchaser within the taxing statute, became obligated to pay the

purchase price.

"But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See United States v. Algoma Lumber Co., 305 U. S. 415, 421, 83 L. Ed. 260, 263, 59 S. Ct. 267; United States v. Driscoll, 96 U. S. 421, 24 L. Ed. 847. It can hardly be said that the contractors were not free to obligate themselves for the purchase of materials ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the Contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Govern-[fol. 43] ment on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract. Cf. James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, 114 A.L.R. 318 supra; United States v. Driscoll, supra.

"We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government, and entitled to be reimbursed by it for the cost, including the tax, no more results in an infrirement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in James v. Drave Centracting Co., 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208, 114 A.L.R. 318, supra."

Alabama v. King & Boozer, supra.

It is insisted by the complainants and the United States of America that Section 9(b) of the Atomic Energy Act expressly exempts transactions such as those reflected by the record herein from taxation. The language of the Act relied upon is as follows:

"In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at c the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from tax-. ation in any manner or form by any State, County, municipality, or any subdivision thereof."

Section reveals that the Commission is directed to take into consideration the burdens its activities and the activities of its ments might case upon the state and local governments when considering the amount of tax to be paid to those authorities in lieu of property taxes but in the last sentence quoted above, which grants exemption from taxation, it is only the Commission, its property, its activities, and its income which are "expressly exempt from taxation in any

manner or form by any State, County, municipality, or any subdivision thereof.' It results that the failure of the Congress to use the word "agents" in the last sentence wherein the Commission was exempt from taxation indicates clearly that the Congress did not intend that the Commission's agents or those with whom it dealt should also be exempt from taxation.

The Congress has upon numerous occasions expressly refused to exempt contractors engaged in work for the Government under cost-plus-fixed-fee contracts from the burdens of taxing statutes. This point was commented upon in Alabama v. King & Boozer, suprayand also in Standard Oil Co. v. Fontenot, 4 So. (2) 637.

It is well established that a fixed policy of the Government will not be changed by presumption. The intention to bring about a change of an established policy must be

expressed in apt words and not left to conjecture.

Expressing the same thought the Supreme Court, in Robertsony. Railroad Labor Board, 268 U.S. 618, said:

[fol. 45] "It is not lightly to be assumed that Congress intended to depart from a long established policy?"

It will, therefore, not be presumed that the Congress intended to grant exemptions from taxation to private corporations organized for profit engaged in performing work under cost-plus-fixed-fee contracts with Atomic Energy Commission.

No authority is cited which empowers a governmental agency to convert a corporation engaged in business in its own behalf for profit into an "instrumentality of Government" and thereby extend to it exemptions from taxation. This would be vesting the governmental agency with legislative powers and could work a destruction of the Government.

Consequently, the Court will not presume that it was the intention of the Congress to vest the Commission with the power to select those who should enjoy immunities of taxaction by using the word "activities" in Section 9(b) of the Atomic Energy Act.

The bills in these four cases and the intervening petitions

will be dismissed, decrees accordingly.

Alfred T. Adams, Special Chancellor.

[fol. 46] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65015

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

and

No. 65164

WILSON-WEESNER-WILKINSON Co.

VS.

SAM K. CARSON, Commissioner of Finance & Taxation, etc.

and

No. 65014

CARBIDE & CARBON CHEMICALS. CORP.

VS.

SAM K. CARSON, Commissioner of Finance & Taxation, etc.

and

No. 65163

DIAMOND COAL MINING COMPANY

VS.

SAM K. CARSON, Commissioner of Finance & Taxation, etc.

ADDENDUM TO OPINION-Filed May 25, 1950

Since the opinion was filed in the above cases it has come to the Court's attention that an erroneous statement of fact is contained therein, to wit:

"The contracts provide that Roane-Anderson and Carbide & Carbon shall not pledge the credit of the United States of America." This statement is applicable to the Carbide & Carbon con-[fol. 47] tract but the Roane-Anderson contract does not

contain this provision.

The Court is of the opinion that this is not determinative of the issues involved and therefore no change than is above stated is made in the opinion as filed.

Alfred T. Adams, Special Chancellor.

[fol. 48] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65015

ROANE-ANDERSON COMPANY

VS.

SAM K. CARSON, Commissioner

and

No. 65164

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDERSON COMPANY

VS.

SAM K. CARSON, Commissioner

Complainants' Request for Findings of Fact—Filed July 21, 1950

Come the complainants, Roane-Anderson Company and Wilson-Weesner-Wilkinson Company, in the above cases, which have been consolidated for the purpose of trial, and pray that the Court make specific findings of fact as follows, to wit:

1. The Complainant Roane-Anderson Company is a costplus-fixed-fee contractor of the United States Atomic Energy Commission operating under Contract W-7401-[fol. 49] ENG-113 at Oak Ridge, Tennessee. The Complainant Wilson-Weesner-Wilkinson Company is a commercial firm which sold items of personal property to the Complainant Roane-Anderson Company for use by the latter in the performance of its contract with the Atomic Energy Commission.

- 2. The facts of these cases are developed from the allegations of the complainants which the answers thereto admit or fail to deny and from the depositions taken on December 13 through 15, 1948 and on April 4, 1949, and stipulations agreed to by the parties.
- 3. The Complainant Roane-Anderson Company, a subsidiary of the Turner Construction Company organized specifically for this purpose, on February 14, 1944, entered into a contract with the United States of America, as an incident to the prosecution to World War II then in progress, and designated by the parties thereto as Contract W-7401-ENG-115. That contract, and amendments thereto through July 6, 1948, are Exhibits 1, 2 and 27 herein. The scope of the work contemplated under said contract was important at that time and remains important at this time, in relation to matters of extremely grave concern to the national welfare, security and defense. The Complainant Roane-Anderson promptly entered upon performance of said contract, and has been engaged therein ever since, and is so engaged at the present time.
- 4. The Act of Congress of August 2, 1946 (Public Law 585—79th Congress, 42 USCA 1801, et seq.), known as the Atomic Energy Act of 1946, duly provides for the transfer of all properties, responsibilities, duties, rights, etc., from [fol. 50] the Government's agency which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which the Complainant Roane-Anderson then and now maintains its offices and carries on its work under said contract.
- 5. The Governmental agency through which said work had been carried on until the transfer to the Atomic Energy Commission was known as the Manhattan Engineer District of the United States Army Corps of Engineers. Acting pursuant to and in accordance with the provisions of said Act, the President of the United States duly issued Executive Order No. 9816, dated December 31, 1946, which transferred to and made the aforementioned contracts, contracts between the Atomic Energy Commission, agency of

the United States of America, and the Complainant Roane-Anderson Company as of midnight December 31, 1946.

6. As a necessary and integral part of the work under, and in the course of action required by said contracts, the Complainant Roane-Anderson Company has purchased property of the kind described as being taxable under the Tennessee Retailer's Sales Tax Act of 1947, and will continue to purchase such property in the performance of its contract.

7. The Complainant Roane-Anderson has paid Tennessee sales and use taxes on the purchases of property for use under its contract with the Commission and described as being taxable under said statute. On October 15, 1947. Complainant Roane-Anderson paid to the defendant Sam [fol. 51] K. Carson \$1,264.98, claimed by said Defendant to be payable as the "use tax" on purchase by the Complainant Roane-Anderson outside the State of Tennessee for use under its contract with the Commission for the month of September, 1947. Said tax was paid under protest and involuntarily, and suit to recover same begun within the time provided by law. During November 1947, the Complainant Roane-Anderson purchased in the State of Tennessee from the Complainant Wilson-Weesner-Wilkinson Company certain reinforcing steel, wire mesh, concrete carts and a shovel attachment for a sales price of \$5,593.68. The Complainant Roane-Anderson paid to the Complainant Wilson-Weesner-Wilkinson Company said sales price, together with a sum of \$111.87 representing the amount of "sales tax" claimed to be due thereon by the Defendant, Sam K. Carson, which tax was duly paid by the Complainant Wilson-Weesner-Wilkinson Company to said Defendant under protest/and involuntarily on December 19, 1947, and suit for recovery of same begun within the time prescribed by law.

8. All of the procurements of property by the Complainant/Roane-Anderson Company asserted to be taxable by the Defendant under said Tennessee sales tax statute were purchased solely for use under its contract with the Commission, and were obtained under, and handled through the same procedures and arrangements as the purchases by said Complainant described in the testimony and the exhibits attached. The Roane-Anderson Company procedures and forms are shown by Exhibits 4 through 17, and 18 through 26.

[fol. 52] 9. As the legality of the tax collections here under consideration involve the legal status of the Complainant Roane-Anderson Company under its contract with the United States Government, this contract, and the Com-

plainants' operations will be summarized.

10. By contract W-7401-ENG-115, as amended from time to time, the Roane-Anderson Company contracted to "manage, operate, and/or maintain facilities, utilities, roads, services, properties and appurtenances situated within and/or outside the Clinton Engineer Works in the State of Tennessee, including, but not limited to Government-owned facilities, utilities, roads, services, properties, and appurtenances, as directed or authorized" by the Government. (Exhibit 1, Article 1.) This contract was a cost-plus-a-fixed-fee contract.

11. The Town of Oak Ridge was built for the sole purpose of housing workers necessary for the construction and operation of the Government's plants at Oak Ridge. The Government acquired by purchase or condemnation all of the land, some 59,000 acres, on which the city and the plants were built, although it did not take exclusive jurisdiction thereof. It is stipulated by the parties that all the buildings on the land comprising the area known as the Clinton Engineer Works, including the Town of Oak Ridge, were built for the Government and belong to the Government. (P. 211, following depositions in Carbide case.)

12. The Roane-Anderson Company was engaged by the [fol. 53] Government primarily as the "town management" contractor and does no direct operations in connection with the Atomic Energy Commission plants in Oak Ridge. The Company has operated for the Government the town bus system, cafeterias, dormitories, and the hospital, all of which were Government-owned. The Company presently manages the Government-owned housing facilities in Oak Ridge, maintains the roads and streets, utility systems (electricity, water, sewerage disposal,) and obtains concessionaires to operate businesses or commercial enterprises in Oak Ridge using Government-owned facilities and on Government-owned property. Under its contract Roane-Anderson Company provides these services, executes contracts, housing licenses and concessionaire agreements as

1.1.

agent for the government (Exhibit 1, Article 1, Paragraph 3.) The Roane-Anderson Company owns none of the real or personal property which it operates or manages, or uses in the performance of its contract.

13. The Roane-Anderson Company also performs certain maintenance and repair services on other Government-owned buildings and properties, and carries on its payroll a number of employees designated as "mandatory employees", who perform municipal type services under the direction of employees of the Government; for example, policemen, and firemen. The supplies, materials and equipment needed for such organizations of "mandatory employees" are procured by the Roane-Anderson Company and paid for in the same manner as all other purchases by the Company.

14. All of the Company's activities under its contract are under the direct supervision of a Contracting Officer of [fol. 54] the Government (Exhibit 1, Article XVIII), and the manner and extent of the various services and operations of the Company are subject to the direction and authorization of the Contracting Officer (Exhibit 1, Article 1, Section 1 et seq.) The contract expressly provides that in the operation of the facilities under this contract, and in the procurement of any and all supplies, materials and equipment necessary to the performance of the work thereunder, the Company shall act as agent for the United States of America (Exhibit 1, Article 1, Section 3, and Article VII, Section 3C). The Company has so acted at all times in purchasing the items of personal property asserted by the defendant to be taxable under the Tennessee Sales Tax Law. (Testimony, p. 94) ..

15. The Government agreed to pay Roane-Anderson Company its cost of the work plus a fixed fee based on the estimated cost at the time—the contract was entered into. By the terms of the contract the Government can increase or decrease the "management, operation, and maintenance services" called for in the contract without there being an adjustment in the fee payable to the Company (Exhibit 1, Article IV).

16. The contract provides subject to the approval of the Government, that the Company shall prescribe the rates and charges to be paid by persons benefiting from or using Government property managed by the Company, that the

Company will collect the revenues arising therefrom, and use such revenues to reduce the cost of the work under the contract (Exhibit 1, Article II, and Article V, Section V). [fol. 55] 17. The contract also authorizes the Company to sell Government-owned property in its possession or transferred to it for disposal, and the proceeds of such sales paid in as the Contracting Officer shall direct. (Exhibit 1, Article 1, Section 2j).

18. Title to property furnished by the Government for use by the Company remains in the Government (Exhibit 1. Article V. Section 2b), and title to all materials purchased by Roane-Anderson, and for which it is entitled to rembursement, vests in the Government in accordance with the contract (Exhibit ol, Article IX) and the purchase orders issued by the Company (Exhibit 5). The contract requires that all property title to which is vested in the Government, shall be suitably marked to indicate that such items are the property of the Government, and requires the Company to turn over to the Government at the expiration or termination, or upon demand of the Contracting Officer, all such "equipment, machinery, tools and unused materials and supplies to the place designated by the Contracting Officer." (Exhibit 1, Article V, Section 2b). The contract further provides that all legal matters arising in connection with the work shall be referred to the Government; that the Government will provide the necessary office space for the Company, and that it is the intent of the parties that the work is to be performed at the expense of the Government, and the Company shall not be liable for any loss, damage, claim, or expense of any kind arising out of the performance of the contract, unless such expense results from the wilful misconduct of the Company's officer (Exhibit 1. Article XXVIII).

[fol. 56] 10. The salaries and expenses of the Company employees, to be reimbursed, must be approved by the Government (Exhibit 27, Exhibit 1, Article XXX, and Article V, Section 1); certain key personnel for the Company's organization cannot be employed without prior approval of the Government (Exhibit 1, Article V, Section 1e); the Government may require the Company to dismiss employees deemed by the Government to be incompetent, careless, or insubordinate or whose continued employment is deemed to be inimical to the public interest; all labor

disputes or threatened disputes, must be brought to the attention of the Government; and all contracts between the Company and unions representing its employees must be submitted to the Government for approval (Exhibit 1, Article XX).

20. Method of Reimbursing Cost: As stated in the testimony (p. 97) as of May 31, 1947, Roane-Anderson had advanced to the Government for the purposes of this contract some \$100,000.00, and Roane-Anderson at that time had on hand some \$200,000.00 of Government money for use in connection with the contract work. The money advanced by Roane-Anderson to the Government was obtained from Company sources, and the Government money on hand represented revenues collected by Roane-Anderson on the Government's account and reimbursements made to Roane-Anderson, by the Government. This money was on deposit in the Hamilton National Bank of Knoxville, Tennessee, in the name of Roane-Anderson. From this account the Company paid the salaries of its employees, the cost of materials procured for the work, and all other expenses under the contract. The fee payments by the Government [fol. 57] to Roanc-Anderson were not made from this money.

21. Since the Government did not originally advance a sum of money with which to carry on the contract work, it was necessary for the Company to establish a working fund for this purpose. In addition, however, all of the revenues collected by Roane-Anderson for the Government from rentals of Government property, sales of Government property, and for other charges and income from the use of Government facilities were deposited by Roane-Anderson in the Hamilton National Bank, and thereafter used in paying obligations incurred under the contract. As the amount of revenue and income of these sources increased, Roane-Anderson was able to reduce the amount of its own funds necessary to pay for the contract work and since July 1, 1948 the company has had none of its own money employed in its operations under the contract (testimony, p. 97). This result, which was intended by the parties, was brought about by Rosne-Anderson paying the contract costs out of the revenues received, and in turn billing the Government for the full amount of the expenditures, which, when reimbursed to Roane-Anderson by the Government,

were deposited to Roane-Anderson's account in the Hamilton National Bank. At the present time Roane-Anderson operates entirely out of revenues it collects for the Government and advances of money by the Government to

Roane-Anderson (testimony, pages 97, 143-147).

22. For a description of the reimbursement procedure,

reference is made to the exhibits filed with the depositions in this case for the purchase of a radio transmitter-receiver by Roane-Anderson from the Motorola Company. [fol. 58] 23. Procurement of Property: In the conduct of its work for the Commission, Roane-Anderson purchases annually a large volume of personal property, both in Tennessee and outside of the State, for use under its contract. All procurements of such property by Roane-Anderson prior to December 1, 1947, were made on purchase order forms such as shown by Exhibits 6 & 7 as agent for the Government. From and after said December 1, 1947, such purchases have been made as agent for the Government on a purchase order form such as shown by Exhibit 8, and subject to the conditions stated on the reverse thereof. The contract with the Government expressly provides that Roane-Anderson shall act as agent for the Government when procuring such property, and that any purchases over \$2,300 in amount must be forwarded to the Government for approval prior to placing with the vendor.

24. Vendors are directed on the purchase orders to ship the property to the Atomic Energy Commission, Oak Ridge, Tennessee, care of Roane-Anderson Company. When property so purchased is received at the warehouse in Oak Ridge, remployees of Roane-Anderson inspect and accept the purchased items. Until October, 1948, the Government also made spot checks of materials being received by Roane-Anderson. On these spot checks the Government inspector would prepare an inspection sheet (Exhibit 13) in addition to the fally-in sheet prepared by Roane-Anderson Company (Exhibit 12). Under the present procedures the Government does not inspect or make spot checks of incoming purchases, although it does review and approve Roane-Anderson's procedures and organization for inspection and ac-[fol. 59] cepting incoming items. On acceptance of the property by Roane-Anderson an approrpiate marking is affixed to the property (if of such a nature that it can be marked) to indicate that it is the property of the Government. The symbol used for this purpose by Roane-Anderson consists of the letters "USRA". Following receipt of the vendor's invoice (Exhibit 11), and preparation of a receiving, inspection, and acceptance report (Exhibit 14), which is countersigned by a representative of the Government, Roane-Anderson pays the invoice (Exhibit 15) and submits a reimbursement voucher to the Government for the amount of its expenditures (Exhibit 17).

25. All of such property purchased by Roane-Anderson is used by the Company in the operation of the facilities carried on for the Government, or in the repair or alteration of Government-owned property, or by some of the "mandatory employees" on Roane-Anderson's payroll in the per-

formance of municipal type functions.

26. The contract between Roane-Anderson and the Government provides (Exhibit 1, Article IX):

"Title to all materials, tools, machinery, equipment, and supplies which the contractor purchases in accordance with Article I of this contract, and for which the contractor shall be entitled to reimbursement under Article V, shall vest in the Government at such point or points as the Contracting Officer may designate in wiriting, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment, and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further, that upon final inspection the contractor shall be given written notice of acceptance or rejection as the case may be."

[fol. 60] 27. This provision of the contract is standard form language used in many types of Government contracts, and reserves to the Contracting Officer full control over when and where the Government would take title to property being procured for it. This language is primarily intended to cover situations where the Government was procuring property which had to pass through several contractors before delivery to the Government (testimony, pages 34-36). Under this contract, no point was designated by the Contracting Officer as the point at which title would pass (testimony, pages 36-127, 141-A, 159-160). Until the revision of the Roafe-Anderson purchase order form (Exhibits 8-J) all orders carried the statement that "this order is for the account of the United States Government and becomes

property of the Government at the time it is shipped." Although this statement was removed from the purchase order form with the -prooval of the Contracting Officer, the effect thereof was merely to permit passage of title at

the f.o.b. point specified in the purchase order.

28. It was and remains the intent of the Government and Roane-Anderson that the title to property purchased by Roane-Anderson vested in the Government at the moment title passed from the vendor, and all property purchased by Roane-Anderson has been so treated (testimony, pages 36-39, 122, 129, 163, 167, 168). Nowritten notices of acceptance by the Government of the materials purchased by Roane-Anderson were prepared and forwarded to Roane-Anderson, other than the inspection reports made on a spot [fol. 61] check basis and the signing, by a representative of the Government, of the inspection and receiving reports prepared by Roane-Anderson (Exhibit 14; testimony, pages 61-62, 165).

S. Frank Fowler, Solicitor for the Complainants, 1412 Hamilton Bank Building, Knoxville, Tennes-

July 21, 1950.

[fol. 62] IN THE CHANCERY COURT OF DAVISON COUNTY

No. 65015

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner

and

No. 65164

WILSON-WEESNER-WILKINSON COMPANY and ROANE-

VS.

SAM K. CARSON, Commissioner

DEFENDANTS REQUEST FOR FINDINGS OF FACT August 9, 1950

Comes the defendant James Clarence Evans, Commissioner of Finance and Taxation of Tennessee, in the above

causes which have been consolidated for trial, and prays that the court make the following findings of fact:___.

1. That complainant Roade-Anderson Company is a private, profit-type Tennessee corporation, and is a cost-plus-fixed-fee contractor with the United States Atomic Energy Commission operating under contract W-7401-ENG-115 at Oak Ridge, Tennessee. The complainant Wilson-Weesner-Wilkinson Company is a private, profit-type Delaware [fel. 63] corporation, domesticated in Tennessee, and is a commercial firm which sold items of personal property to Roane-Anderson Company for use by the latter in the performance of said contract with the Atomic Energy Commission.

2. The facts of these cases are developed from the allegations of the original bills which the answers thereto admit or fail to deny, the depositions taken and filed in the cause, the exhibits thereto, the stipulations of fact made by the parties, and from the public documents filed in the cause by complainants and the intervenors, and all such facts and matters as the Court is required to take judicial mowledge of.

3. The complainant Roane-Anderson Company entered into a contract with the United States of America on November 23, 1943, as an incident to the prosecution of World War II then in progress. The contract was designated by the parties as contract W-7401-ENG-115. Said contract was entered into pursuant to the War Powers Act, Public Law 354, 77th Congress, which authorized the President of the United States, for the better utilization of resources and industries, to authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, to enter into contracts and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making of contracts generally, whenever the President deemed such action would facilitate the prosecution of the war. Said War Powers Act provided further that such contracts [fol. 64] should be a matter of public record under regulations prescribed by the President. By Presidential Executive Order No. 9001, the President authorized the Army and Navy to enter into contracts necessary for the prosecution of the war, and in said Executive Order authorized the Army and Navy by Title 2, Section 4 of said Executive

Order, to make advance payments to such contractors. The contract, and the amendments thereto through June 30, 1948 are Exhibits 1, 2, and 27 herein. The scope of the work contemplated under said contract was important at that time and remains important at this time in relation to matters of extremely grave concern to the National Welfare and Security Defense. The complainant Roane-Anderson Company promptly entered upon the performance of said contract, and has been engaged therein ever since.

4. The Act of Congress of August 2, 1946 (Public Law 585-79th Congress, 42 USCA 1801, et seq.), known as the Atomic Energy Act of 1946, duly provides for the transfer of all properties, responsibilities, duties, rights, etc., from the Government's agency which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which the complainant Roane-Anderson Company then and now maintains its offices and carries on its work under said contract. α

5. The governmental agency through which said work had been carried on until the transfer to the Atomic Energy Commission was known as the Manhattan Engineer District of the United States Army Corps of Engineers. Acting pursuant to and in accordance with the provisions of said [fol. 65] Act, the President of the United States duly issued Executive Order No. 9816, dated December 31, 1946, which transferred to and made the aforementioned contract, a contract between the Atomic Energy Commission, an agency of the United States of America, and the complainant Roane-Anderson Company as of midnight December 31, 1946.

6. As a necessary and integral part of the work under, and in the course of action required by said contract, the complainant, Franc-Anderson Company, has purchased property of the kind described as being taxable under the Tennessee Retailer's Sales Tax Act of 1947, and will continue to purchase such property in the performance of its contract.

7. The complainant Roane-Anderson Company has paid Tennessee use taxes on the purchase or property for use under its contract with the Commission and described as being subject to the use tax under statute. It has also

paid as a part of the purchase price of tangible personal property amounts equal to the tax levied against vendors of such property for the privilege of engaging in the business of making sales thereof in Tennessee. On October 15th, 1947, complainant Roan-Anderson Company paid to defendant Sam K. Carson, then Commissioner of Finance and Taxation of Tennessee, \$1,264.98, which sum was claimed by said defendant to be payable as the use tax on purchases by complainant Roane-Anderson Company from out-of-state vondors for use under its contract with the Commission for the month of September, 1947. Said tax was paid under protest and involuntarily and suit to re-[fol. 66] cover same was begun within the time provided During November, 1947, the complainant Wilson-Weesner-Wilkinson Company in the course of business sold to complainant Roane-Anderson Company certain items of personal property for a total sales price of \$5,705.55, which price included the sum of \$111.87, required to be added as a part of the sales price of said items of personal property by the Tendessee Retailer's Sales Tax Act. The sales transaction taking place in Tennessee, when complainant Wilson-Weesner-Wilkinson Company paid the tax provided by the Sales Tax Act on its gross sales in Tennessee, it paid \$111.87 as a tax for the privilege of engaging in the business of making sales of tangible personal property to complainant Roane-Anderson Company. This amount was paid under protest and involuntarily on December 19, 1947 and suit to recover the same was commenced within the time prescribed by law.

ant Roane-Anderson Company asserted to be taxable by the defendant under said Tennessee Sales Tax statute were purchased solely for use under its contract with the Commission, and were obtained under, and handled through, the same procedures and arrangements as the purchases of said complainant described in the testimony and the exhibits attached. The Roane-Anderson Company procedures and forms are shown by Exhibits 4 through 17, and

18 through 26.

9. The Town of Oak Ridge was built for the sole purpose of housing workers necessary for the construction and operation of the Government's plants at Oak Ridge. The Gov-[fol. 67] ernment acquired by purchase or condemnation all

of the land, some 59,000 acres, on which the city and the plants were built, although it did not take exclusive jurisdiction thereof. It is stipulated by the parties that all the buildings on the land comprising the area known as the Clinton Engineering Works, including the Town of Oak Ridge, were built for the Government and belong to the Government. (p. 212, following depositions in Carbide case.)

10. By contract W-7401-ENG-115, as amended from time to time, the Roane-Anderson Company contracted as fol-

lows:

"Article I-Statement of Work

"1. The contractor shall manage, operate and/or maintain facilities, utilities, roads, services, properties and appurtenances situated within and/or outside the Clinton Engineer Works in the State of Tennessee, including, but not limited to, Government-owned facilities, malities, roads, services, properties and appurtenances, as directed or authorized by the Contracting Officer; provided, however, that the work to be performed hereunder shall not be deemed to include the management, operation or maintenance of any processing plant. Work within the restricted plant area or areas may be performed upon the direction or authorization of the Contracting Officer."

"2. By way of illustration, but not limitation, the Contractor shall perform the following services;

"(a) The management, operation, maintenance and repair of residences, hotels, restaurants, cafeterias, dormitories, hutments, trailers, temporary housing facilities, laundries, all other buildings, structures, facilities, utilities, properties and appurtenances, whether similar or dissimilar in nature, auto pool, roads, ways, streets and sidewalks, drainage ditches, garbage disposal, sewage disposal plant and equipment, railroad tracks and appurtenant equipment, transmission lines and appurtenant equipment, water system, heating plants, plumbing and electrical equipment."

[fol. 68] 11. The Roane-Anderson Company has operated for the Government the town bus system, cafeterias, dormitories, and the hospital, all of which were Government-owned. The Company presently manages the Government-

owned housing facilities in Oak Ridge, maintains the roads and streets, utility systems (electric, city, water, sewage disposal), and obtains concessionaires to operate businesses or commercial enterprises in Oak Ridge using Government-owned facilities and on Government owned property. Under its contract Roane-Anderson Company provides these services, executes contracts, housing licenses and concessionaire agreements as agent for the government (Exhibit 1, Article I, Paragraph 3.)

12. The Roane-Anderson Company also performs certain maintenance and repair services on other Governmentowned buildings and properties, and carries on its payroll a number of employees designated as "mandatory employees", who perform municipal type services under the direction of employees of the Government; for example, policemen, and fremen. The supplies, materials and equipment needed for such organizations of "mandatory employees" are procured by the Roane-Anderson Company and paid for in the same manner as all other purchases by the Company. The contract under which these operations are carried on is an independent contractor contract whereby Roane-Anderson Company contracts to do certain work, while the Government provides any money necessary to said work. Said contract has been characterized by Carroll L. Wilson, General Manager, Atomic Energy Commission, in a statement to the Congressional Committee on Atomic Energy on Thursday, February 17, 1949 as [fol. 69] follows:

"The joint committee has requested that a part of this afternoon's hearing be devoted to a discussion of the Commission's contract procedures and practices. The Commission welcomes this opportunity for such a discussion. As you know, we have from time to time, in our reports to the Congress as well as in other published statements, referred to the central rule which contractors occupy in the atomic energy program. We believe that it is important for the public generally and for American business to know and to understand the policies which we are following.

"It will be helpful, I think, to begin by stating in somewhat general terms the Commission's views on the manner in which a major part of its business should

be conducted.

"The Atomic Energy Act of 1946 left it to the Commission to determine, in the light of experience and prevailing circumstances in each case, whether its installations should be directly operated by the Commission or whether they should be operated by private contractors or organizations in accordance, with the practice which had been initiated by the Manhattan District.

"The Commission has been of the view-and we believe this view is amply supported by our 2 years of [fol. 70] experience since we succeeded to the responsibility of the atomic energy enterprise—that we should develop as fully as possible the method of operating through contractual relations with private orgamizations. We have recognized that the high relative significance of weapon production and the necessary secrecy of large parts of the atomic energy program involve the danger that only limited scientific, technical, and managerial résource will be available to this most urgent new atomic enterprise. Such handicaps must be minimized and overcome if this country's rapid progress in the field of atomic energy. is to be assured. Accordingly, the Commission has looked to the basic policy of contractor operation as. a means of developing wide and alert participation in the program by a growing number of private organizations, both academic and industrial.

"By pursuing a basic policy of obtaining contractoroperators the Commission has been able to draw upon the technical and administrative talents of a broad sector of the American economy. Operation of our plants and laboratories through established independent contractors not only gives to the atomic energy program substantial benefits from accumulated experience and established facilities; it also enlists the interest and the support of industry and universities for future private development. It has been our conviction that if atomic energy is to become a generic part [fol. 71] of the American scene it should have its roots deep in the institutions which are so productive a part of American progress in science and technology. The identities of the contractor-operators at the Commis- . sion's major facilities are of course well known to

the members of the joint committee. At Oak Ridge the production and the laboratory facilities are operated by the Carbide & Carbon Chemicals Corporation, while the Roane-Anderson Co. is the principal contractor for twon operations." (p. 47 of "Los Alamos Retrocession Bill and AEC Contract Policy—Hearings Before the Joint Committee on Atomic Energy, Congress of the United States, Eighty-First Congress, First Session on Los Alamos Retrocession Bill and AEC Contract Policy, February 17, 21 and 24, 1949.")

0 4

- 13. Article XVIII of the contract covers the effect of the Contracting Officer's Decisions, and is in the following language:
 - "1. The services rendered and the work done by the Contractor shall be subject to the supervision and approval of the Contracting Officer to whom the Contractor shall report and be responsible."
- 14. Article I, Section 3, and Article VIII, Section 3 (c) provide as follows:
 - "3. In the operation of the facilities under this contract, and in the procurement of any and all such supplies, materials and equipment necessary to the performance of the work hereunder, the Contractor shall act as agent for the United States of America, it being understood and agreed, however, that all personnel and labor shall be and remain for all purposes the employees of the Contractor, exclusively, it being understood and agreed that the duties and functions of all such persons will be performed under [fol. 72] the sole supervision and direction of the Contractor, except as otherwise expressly provided in this contract or as otherwise mutually agreed in writing between the Contractor and the Contracting Officer."

Article VIII, Section 3(c):

"(c) Reduce to writing, unless this provision is waived in writing by the Contracting Officer, every contract in excess of Two Thousand Five Hundred Dollars (\$2,500.00) made by it for services, materials,

supplies, tools, machinery and equipment, or for the use thereof in connection with the work under this contract. Make all such contracts in its name as agent for the United States of America. No purchase in excess of Two Thousand Five Hundred Dollars (\$2,500.00) shall be made or placed without the prior approval of the Contracting Officer."

15. These provisions of the contract whereby, first, the United States Army Engineers, and, second, the Atomic Energy Commission, themselves merely agencies of the Federal Government, undertake to constitute Roane-Anderson Company an agent of the United States Government, were placed in the contract for the purpose of avoiding state taxes. On page 6 of Exhibit 36 in the Roane-Anderson Company case, the same being a copy of the negotiations between the United States Army Engineers and Roane-Anderson Company, leading up to the integration of contract No. W-7401-ENG-115, the following statement appears:

"Operation, Supervision and Maintenance, as an

agent for the Government.

"(Note) The agency provision will be to the benefit of the Government as it will probably make it possible for the Government to avoid the expense of paying [fel. 73] for certain taxes, permits, licenses and fees that might otherwise be required and secured and paid for; by the contractor as a reimbursable item of cost by the Government." (Emphasis ours.)

The Court finds that Roane Anderson Company is the agent of the United States Government only in the sense that it is the means or medium through which United States Government secures the execution of certain work which it is not prepared to undertake the execution of for itself. That Roane-Anderson is not an agency or instrumentality of the Federal Government and that it was not the intent of the contracting parties to undertake to bestow upon Roane-Anderson Company any such status. That even if such was the intent of the parties to the contract, it did not have this effect, because the United States Agmy Engineers and the Atomic Energy Commission are not authorized by the War Powers Act nor by the Atomic Energy Act to constitute and make governmental agencies

of those private contractors who may contract to do work

with such governmental agencies:

16. The Government agreed to pay Roane-Anderson Company its cost of the work plus a fixed fee based on the estimated cost at the time the contract was entered into. By the terms of the contract the Government canincrease or decrease the management, operation, and maintenance services" called for in the contract without there being an adjustment in the fee payable to the Company (Exhibit 1, Article IV).

[fol. 74] 17. The contract provides, subject to the approval of the Government that the Company shall prescribe the rates and charges to be paid by persons benefiting from or using Government property managed by the Company, that the Company will collect the revenues arising therefrom, and use such revenues to reduce the cost of the work under the contract (Exhibit 1, Article II, and Article V. Section V).

18. The contract also authorizes the Company to see Government-owned property in its possession or transferred to it for disposal, and the proceeds of such sales paid in as the Contracting Officer shall direct. (Exhibit 1,

Article 1, Section 2 j). .

19. Title to property furnished by the Government for use by the Company remains in the Government (Exhibit 1, Article V, Section 2b), and title to all materials purchased by Roane-Anderson, and for which it is entitled to reimbursement, vests in the Government in accordance with the contract (Exhibit 1, Article IX). The contract requires that all property, title to which is vested in the Government, shall be suitably marked to indicate that sich items are the property of the Government, and requires the Company to turn over to the Government at the expiration or termination, or upon demand of the Contracting Officer, all such "equipment, machinery, tools, and unused materials and supplies to the place designated by the Contracting Officer. (Exhibit 1, Article V, Section 2(b)). The contract further provides that all legal matters arising in connection with the work shall be referred to [fol. 75] the Government; that the Government will provide the necessary office space for the Company, and that it is the intent of the parties that the work is to be performed at the expense of the Government, and the Company shall not be liable for any loss, damage, claim,

or expense of any kind arising out of the performance of the contract, unless such expense results from the wilful misconduct of the Company's officer (Exhibit 1, Article XXVIII).

20. The salaries and expenses of the Company employees, to be reimbursed, must be approved by the Government (Exhibit 27, Exhibit 1, Article XXX, and Article V. Section 1); certain key personnel for the Company's organization cannot be employed without prior approval of the Government (Exhibit I, Article V, Section 1 (e); the Government may require the Company to dismiss employees deemed by the Government to be incompetent, careless, or insubordinate or whose continued employment is deemed to be inimical to the public interest; all labor disputes, or threatened disputes, must be brought to the attention of the Government; and all contracts between the Company and unions representing its employees must be submitted to the Government for approval (Exhibit 1, Article XX). All of the contract provisions summarized in Items 18 and 19 are for the purpose of enabling the Government to control the cost of the contract which it has to pay and are not for the purpose of retaining a right to exercise a control over the manner of the execution of the details of the contract.

[fol. 76] 21. Cost of the Work. Provision for payment is made by Article V of the contract. This Article provides in substance that the contractor shall be reimbursed for actual expenditures in the performance of the contract . including labor, material, tools, machinery, equipment, supplies, fuel, etc. Provision is also made for reimbursement of all other items of expense authorized by the coutract. Under this Article the Government has reserved the right to furnish any materials, equipment, machinery, and tools necessary to the performance of the contract, but the Government has not furnished any of these items except in insignificant amounts. Practically all of these items have been purchased by the contractor. The contractor is required under this article, upon completion of the contract to return the equipment, machinery, tools and unused materials and supplies to the Government at the place designated by the Centracting Officer. Section 5 of Article V provides that all revenue received by the Contractor from rebates, discounts, refunds, etc. shall be applied in reduction of the cost of the work.

22. Article VI-Payments. This Article provides that the Government will currently reimburse the contractor for expenditures upon certification of the signed payrolls for labor, the receipt of invoices for materials, the reimbursement to be made weekly, but if conditions warrant, reimbursements may be made at more frequent intervals. Provision is also made for the payment of the fixed fee. The contract does not contain any provision for the making [fol. 77] of advance payments to Roane-Anderson. It is obvious that the customary advance payment contract provision, such as were included in Carbide and Carbon contract, were omitted because it was not expected that the character of the work performed by Roane-Anderson, which consisted primarily of the operation of the Government housing facilities, would call for an outlay of money which would require that the Government make advance payments.

23. Method of Reimbursing Cost. As stated in the testimony (p. 97) as of May 31, 1947, Roane-Anderson had advanced to the Government for the purposes of this contract some \$100,000.00, and Roane-Anderson at that time had on hand some \$200,000.00 of Government money for use in connection with the contract work. The money advanced by Roans-Anderson to the Government was obtained from Company sources, and the Government money on hand represented revenues collected by Roane-Anderson on the Government's account and reimbursements made to Rolle-Anderson by the Government. This money was on deposit in the Hamilton National Bank of Knoxville, Pennessee, in the name of Roane-Anderson. From this account, the Company paid the salaries of its employees, the cost of materials procured for the work, and all other expenses under the contract. The fee payments by the Government to Reane-And erson were not made from this money.

24. Since the Government did not originally advance a sum of money with which to carry on the contract work, it [fol. 78]—necessary for the Company to establish a working fund for this purpose. In addition, however, all of the revenues collected by Roane-Anderson for the Government from rentals of Government property, sales of Government property, and for other charges and income from the use of Government facilities were deposited by Roane-Anderson in the Hamilton National Bank, and thereafter used in paying obligations incurred under the contract. As

the amount of revenue and income of these sources increased, Röane-Anderson was able to reduce the amount of its own funds necessary to pay for the contract (testimony, p. 97). This result, which was intended by the parties, was brought about by Roane-Anderson paying the contract costs out of the revenues received, and in turn billing the Government for the full amunt of the expenditures which, when reimbursed to Roane-Anderson by the Government, were deposited to Roane-Anderson's account in the Hamilton National Bank. At the present time, Roane-Anderson operates entirely out of revenues it collects for the Government and advances of money by the Government to Roane-Anderson (testimony, pages 97, 143-147).

25. For a description of the reimbursement procedure, reference is made to the exhibits filed with the depositions in this case for the purchase of a radio transmitter-receiver

by Roane-Anderson from the Motorola Company.

26. Procurement of Property: In the conduct cf its work for the Commission, Roane-Anderson purchases annually a large volume of personal property, both in Tennessee and [fol. 79] outside of the State, for use under its contract. All procurements of such property by Roane-Anderson prior to December 1, 1947, were made on purchase order forms such as shown by Exhibits 6 and 7. From and after said December 1, 1947, such purchases have been made on a purchase order form such as shown by Exhibit 8, and sub-

ject to the conditions stated on the reverse thereof.

27. Vendors are directed on the purchase orders to ship the property to the Atomic Energy Commission, Oak Ridge, Tennessee, care of Roane-Anderson Company. When property so purchased is received at the warehouse in Oak Ridge, employees of Roane-Anderson inspect and accept the purchased items. Until October, 1948, the Government also made spot checks of materials being received by Roane-Anderson. On these spot checks the Government inspector would prepare an inspection sheet (Exhibit 13) in addition to the tally-in sheet prepared by Roane-Anderson Company (Exhibit 12). Under the present procedures the Government does not inspect or make spot checks of incoming purchases, although it does review and approve Roane-Anderson's procedures and organization for inspection and accepting incoming items. On acceptance of the property

by Roane-Anderson an appropriate marking is affixed to the property (if of such a nature that it can be marked) to indicate that it is property of the Government. The symbol used for this purpose by Roane-Anderson consists of the letters "USRA". Following receipt of the vendor's invoice (Exhibit 11), and preparation of a receiving, inspec[fol. 80] tion, and acceptance report (Exhibit 14), which is countersigned by a representative of the Government, Roane-Anderson pays the invoice (Exhibit 15) and submits a reimbursement voucher to the Government for the amount of its expenditures (Exhibit 17).

28. All of such property purchased by Roane-Anderson is used by the Company in the operation of the facilities carried on for the Government, or in the repair or alteration of Government-owned property, or by some of the "mandatory employees" on Roane-Anderson's payroll in

the performance of municipal-type functions.

29. The contract between Roane-Anderson and the Government provides (Exhibit 1, Article IX):

"Title to all materials, tools, machinery, equipment and supplies which the contractor purchases in accordance with Article I of this contract, and for which the contractor shall be entitled to reimbursement under Article V, shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final impection and acceptance or rejection of such materials, tools, machinery, equipment, and so olies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further, that upon final inspection the contractor shall be given written notice of acceptance or rejection as the case may be."

30. This provision of the contract is standard form contract used in many types of contracts and reserves to the Government full control over when and where it takes title to property procured under the contract. There is testimony in the record to the effect that this language of the contract is intended primarily to cover situations where property is procured which has to pass through the hands [fol. 81] of several contractors before delivery.

31. No point has ever been designated by the Government as the point at which title passes, nor has the Con-

tracting Officer ever given written notice of acceptance or rejection of such materials, tools, machinery, equipment and supplies, as provided for and contemplated by said contract provision.

32. Until the revision of the Roane-Anderson purchase order form (Exhibits 8 and 9), all orders carried this

statement:

"This order is for the account of the United States Government and becomes the property of the Government at the time it is shipped."

This statement was removed from the purchase order form on request of representatives of the Atomic Energy Commission.

33. The purchase order form contains, in addition to the other provisions already mentioned, another provision as follows:

"This Order is placed for the benefit of, and is assignable to, the United States Government. In the event of assignment to and acceptance by the United States Government, seller agrees to look solely to the United States Government for payment under this order." (Roane-Anderson Exhibit 8-9)

34. Assignments of the purchase orders have not been made, nor has the property acquired under the orders been so assigned. Such tangible personal property as had not [fol. 82] been used in the improvement of the Government's real estate or otherwise expended under the contract continues in the possession of Roane-Anderson for use by it under the contract.

35. The Commission, though authorized to do so by Section 9(b) of the Atomic Energy Act, has never made any payments to the State and local governments in lieu of

property taxes.

36. The contracts provide that the Government can furnish materials and supplies and pay for them or the contractors can make purchases and the Government will reimburse the contractors. In the transactions involved herein the contractors made the purchases. Uniformly, the contracts entered into by the contractors for the purchase of materials provided that they are "assignable to the United States Government."

37. The proof indicates that the details of making purchases and transferring personal property to the Government has not always been carried out as provided in the contracts. Nevertheless, the relationship and rights of the parties are determined by the provisions of the contracts and not by the unauthorized acts of their employees.

38. All purchases involved herein were made by the respective contractors and paid for by them from bank accounts maintained by them as required by these contracts. It is true the money was furnished by the United States Government, but this was done pursuant to the provisions

of the contracts.

[fol. 83] 39. From December, 1942 until October, 1946, all. of the materials, supplies and machinery purchased by contractors at Oak Ridge, including Roane-Anderson, were shipped on an ordinary bill of lading which was thereafter converted to a Government bill of lading, in order that land grant freight rates might be made applicable to such shipments. In October, 1946 by Act of Congress, land grant freight rates were abolished. From October, 1946 until May 12, 1948 the practice of converting to Government bills of lading was continued for the purpose of avoiding the 3% Federal transportation tax. After May, 1948 there was no conversion to Government bills of lading except when the shipment was to the United States Government on a Government purchase order, and the contractors at Oak Ridge, including Roane-Anderson, pay the 3% Federal transportation tax on all shipments to them.

40. Provision is made by Article XI, Section 3 of the contract for Roane-Anderson to abide by the eight-hour law, as provided by the United States Code, Title 40, Sections 321, 324, 325, and 326, relating to the hours of labor, as modified by the conditions of Section 303 of Public Act No. 781, 76th Congress, relating to compensation for overtime.

Allison B. Humphreys, Jr., Advocate General, Solicitor for Befendant. [fol. 84] In the Chancery Court for Davidson County, Tennessee

No. 65015

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner

and

No. 65164

WILSON-WEESNER-WITKINSON COMPANY and ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner

ORDER ADOPTING FINDINGS OF FACT-August 17, 1950

This cause was heard on this 17th day of August, 1950 before Alfred T. Adams, Special Chancellor, upon the entire record and more particularly upon the motion of complainants and defendant for the Court to make findings of fact and the written request for findings of fact filed herein on July 21, 1950, by complainants and the written request for findings of fact filed herein on August 9, 1950 by the defendant, from the consideration of all of which the Court doth [fol 85] order, adjudge and decree that it adopts as its findings of fact the findings of fact as set forth in the written request filed herein by the defendant on August 9, 1950 and it is further ordered by the Court that said findings of fact be made a part of this decree:

Alfred T. Adams, Special Chancellor.

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation of .Tennessee

FINAL DECREE-August 29, 1950

Be it ever remembered that this cause came on to be heard on the 29th day of August, 1940 and former days before Alfred T. Adams, Special Chancellor, sitting by election of the Bar of Davidson County, Tennessee, in the place and stead of Honorable William J. Wade, Chancellor, who was unable to attend Court on account of illness, on the original bill and the exhibits thereto, including Contract No. W-7401-ENG-115, dated February 14, 1944, entered into between complainant Roang Anderson Company and the United States of America, together with all amendments to said contract through the 12th day of September, 1949; the answer of defendant; the depositions of witnesses and exhibits thereto; the intervening petition of the United States of America; and the entire record in said cause and upon consideration of all of which the Court finds, in addition to certain other findings of fact heretofore made, as follows:

That the contract No. W-7401-ENG-115, entered into [fol. 87] between complainant Roane-Anderson Company and the United States of America on February 14, 1944, together with all the amendments thereto, is an independent contractor contract of the cost-plus-a-fixed-fee type and creates the relationship of employer and independent contractor between the United States of America and complainant Roane-Anderson Company. That the character, of the relationship was not changed by Executive Order No. 9816 of the President of the United States effective December 31, 1946, whereby the supervision of the discharge of said contract was transferred to the Atomic Energy Com-That, as an independent contractor with the United States of America, whose contract is under the supervision of the Atomic Energy Commission, complainant is not exempt from the use tax levied by Chapter 3 of the Public Acts of the General Assembly of Tennessee for the year 1947 by reason of implied constitutional immunity

of Federal Agencies nor for any of the reasons claimed in the original bill. That Section 9(b) of the Atomic Energy Act of 1946, as amended, does not exempt complainant from the payment of the use tax levied by Chapter 3 of the Public Acts of the General Assembly of Tennessee for the year 1947. That the allegations of the original bill are fully met and overcome by the defenses raised by the answer and established at the hearing, and the original bill should be dismissed at the cost of the complainant. That the intervening petition of the intervenor, the United States of America, which has been fully considered, should, likewise, [fol. 88] be dismissed, but without cost to the intervenor.

It is accordingly ordered, adjudged and decreed, for the reasons stated in the opinion of the Court filed herein and authenticated by the signature of the Special Chancellor, which is ordered made a part of the record herein, and on the findings of fact made by the Court, that complainant's original bill be and the same is hereby dismissed at the cost of complainant, for which execution may issue. The intervening petition of the intervenor United States of America is likewise dismissed but without cost.

The copies of the public documents here listed which were delivered to the Court by complainant of which judicial notice was taken, are ordered filed and made a part of the record.

Hearings before the Committee of Military Affairs— House of Representatives—Seventy-Ninth Congress, First Session on H. R. 4280, October 9 and 18, 1945.

Hearings before the Special Committee on Atomic Energy, United States Senate—Seventy-Ninth Congress— Second Session on S. 1717, Part 1 and Part 3.

[fol. 89] Hearings before the Special Committee on Atomic Energy, United States Senate—Seventy-Ninth Congress, First Session pursuant to S. Res. 179, Parts 1 and 3:-

Hearings before the Joint Committee on Atomic Energy, Congress of the United States—Eighty-First Congress, First Session on Los Alamos Retrocession Bill and AEC Contract Policy.

Senate Document No. 96—80th Congress, 1st Session. Letter from the Chairman and Members of the United States Atomic Energy Commission. Report No. 1211-79th Congress, 2d Session, Senate. Atomic Energy Act of 1946.

Report No. 1186, 79th Congress, 1st Session—House of Representatives—Atomic Energy Act of 1945, and Part 2 of Report No. 1186.

To the action of the Court in dismissing complainant's original bill and taxing it with the cost, and in dismissing the intervening petition of the United States of America, [fol. 90] and to the findings of facts made, and all adverse action taken, both complainant and the intervenor except and pray an appeal to the next term of the Supreme Court of Tennessee sitting at Nashville, which appeal is granted to the intervenor United States of America, without condition, but is granted to the complainant Reane-Anderson Company only on the condition that within thirty days it execute and file with the Clerk and Master an appeal bond in the amount of \$250.00, conditioned as provided by law. It is ordered that all exhibits on file in this cause, including the public documents listed above, shall be sent up to the Supreme Court in original form in event appeal is perfected.

Enter:

Alfred T. Adams, Special Chancellor.

[fol. 91] APPEAL BOND Omitted in Printing

[fol. 92] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65165

WILSON-WEESNER-WILKINSON COMPANY, & Corporation Organized and Existing under the Laws of the State of Delaware, and Roane-Anderson Company, a Corporation Organized and Existing under the Laws of the State of Tennessee, Complainants

VS B

SAM K. CARSON, Commissioner of Finance & Taxation of the State of Tennessee With Offices at Nashville, Tennessee and Individually a Citizen and Resident of Davidson County, Tennessee, Defendant

ORIGINAL BILL-Filed January 19, 1948

The complainants Wilson-Weesner-Wilkinson Company and Roane-Anderson Company show to the Court the following facts:

I

The complainant Wilson-Weesner-Wilkinson Company is a corporation duly organized and existing under the laws of the State of Delaware and qualified under the laws of the State of Tennessee to do business within the latter State [fol. 93] and doing business therein with its principal office in Nashville, Tennessee.

The complainant Roane-Anderson Company is a corporation duly organized and existing under the laws of the State of Tennessee with its principal office at Oak Ridge in Ander-

son County, Tennessee.

The defendant Sam K. Carson is the duly appointed and acting Commissioner of Finance and Taxation of the State of Tennessee and as such was and is charged with the collection of all taxes under the Act of the General Assembly of the State of Tennessee known generally as Tennessee Retailer's Sales Tax Act being Chapter No. 3 of the Public Acts of the year 1947 of the General Assembly of Tennessee; and said defendant promptly entered upon the discharge of his responsibility as collecting officer under said 'Act and the payments hereinafter described were made to him and received by him in his said capacity.

This is a suit brought to recover certain amounts asserted

by said defendant to be due from the complainants under the said Tennessee statute, which amounts the defendant compelled the complainant Wilson-Weesner-Wilkinson Company to pay, although requirements of payment thereof was illegal, complainants not being liable for said tax. The said statute requires the tax to be paid by the 20th day of each month, and this suit is brought for the further purpose of obtaining the adjudication of this Court that said statute and the tax levied thereby do not apply to the complainants in respect to transactions hereinafter described, so that in [fol. 94], the future it shall not be necessary for the complainants to bring a suit each month in order to protect their rights.

On February 15, 1944, the complainant Roane-Anderson Company entered into a contract with the United States of America, being Contract No. W-7401-ENG-115. Said contract was entered into by the United States Government as an incident to the prosecution of World War Two then in progress; the scope of the action contemplated under said contract was important at that time and remains important at this time, in relation to matters of extremely grave concern to the national welfare, security and defense. Complainants file herewith as Exhibit "A" and by such reference the same is made a part hereof, a full and accurate copy of said contract with the additions thereto and modifications thereof which have become effective from time to time.

Ш

Complainant Roane-Anderson Company promptly entered upon the performance of the said contract, and has ever since been engaged therein and is so engaged at the present time.

IV

The Act of the Congress of the United States known as the "Atomic Energy Act of 1946" (42 U.S.C.A 1801, et seq:), which became a law in the latter part of the year 1946, [fol. 95] duly provides for the transfer of all properties, responsibilities, duties, rights, etc., from the governmental instrumentality which had exercised jurisdiction over and

Please refer to Roane-Anderson Exhibit 1.

Anderson Counties, Tennessee, known as the Clinton Engineer Works. The governmental instrumentality through which said work had been carried on until the transer to the Atomic Energy Commission was known as Manhattan Engineer District. It is in said area that the complainant Roane-Anderson Company maintains its offices and carries on its work under said contract.

The full transfer of properties, authorities, rights, obligations, etc., of the Manhattan Engineer District to the Commission created under the Atomic Energy Act of 1946 is provided for and directed by said Act of Congress. Acting pursuant to and in full discharge of the provision of said Act relating thereto the President of the United States has duly issued Executive Order No. 9816 dated December 31, 1946 which has brought about the full transfer intended by Congress under the terms of said Act. Pursuant to and as a result of the said executive order of the President the contract dated February 15, 1944, above referred to became a contract between the Atomic Energy Commission, an instrumentality of the United States of America, and the Complainant Roane-Anderson Company and this change occurred as of midnight December 31, 1946.

As a necessary and integral part of the work performed under and course of action required by said contract with [fol. 96] the Atomic Energy Commission, all of which work and action was and is an essential and an integral part of the activities of the Atomic Energy Commission in the interest of national welfare, security, and defense, the complainant Roane-Anderson Company has continuously purchased property of the kind which is described as being taxable under the said Tennessee Retailer's Sales Tax, Act of 1947, and will continue to purchase such property in the performance of said contract. The number of such purchases which have been made by the said complainant since the effective date of said Act has been very considerable and it wouldunduly lengthen this bill and tax the patience of the Court; and it is wholly unnecessary to enumerate and specifically describe each of the purchases which have been asserted by the defendant to entitle him to collect the tax. All of the properties so purchased and to be purchased by the said complainant under its said contract have been or will be used by the United States and the said complainant in

the performance of the activities of the Atomic Energy Commission and pursuant to the terms of the contract hereinabove mentioned.

VI

During the month of November, 1947, the complainant Wilson-Weesner-Wilkinson Company sold to the complainant Roane-Anderson Company certain reinforcing steel, wire mesh, concrete carts and a shovel attachment which were delivered to the latter complainant in the said area known as the Clinton Engineering Works. The total con-[fol. 97] sideration paid for said materials and equipment was \$5,593.68. Said property came within the description of property above set forth which has been, is being and will be acquired and used by the complainant Roane-Anderson Company under its said contract with the Atomic Energy Commission and the averments above made with respect to such property are true with respect to that thus sold and delivered during the month of November 1947. Said averments are likewise true with respect to previous sales Wilson-Weesner-Wilkinson made to the Roane-Anderson Company, and also with respect to future sales of materials and equipment, used or to be used by Roane-Anderson Company in the Clinton Engineer Works area.

Said sale price of \$5,593.68 was paid by complainant Roane-Anderson Company to the Wilson-Weesner-Wilkinson Company, together with the sum of \$111.87, representing the tax claimed to be due thereon by the defendant, which tax was paid by the former to the latter as directed by the Sales Tax Act.

VII

On December 19, 1947 the complainant Wilson-Weesner-Wilkinson Company having collected the amount of said alleged sales tax from the complainant Roane-Anderson Company paid said amount of \$111.87 to defendant which payment was made by reason of the position taken by the defendant as to the applicability of provisions of the said Tennessee Retailer's Sales Tax Act to the said transactions between the complainants. All of said purchases [fol. 98] were handled by the complainants in compliance with the same procedure and under the same arrangement in the case of each item that was purchased. Each of said purchases was consummated through the use of forms and

under the express provisions of and according to the procedure shown by Exhibit "B" 2 filed herewith and made a part hereof, the pages of which are actual photostated copies of original records in the possession of the complainants as follows:

Page 1. Complainant Roane-Anderson Company's Requisition No. G-7901Y.

Page 2. Complainant Roane-Anderson Company's Purchase Order No. 40721:

Page. 3. Second page of said complainant's Purchase Order No. 40721.

Page 4. Complainant Roane-Anderson Company's Purchase Order No. 40721.

Page 5. Invoice of Wilson-Weesner-Wilkinson Company No. L-1643.

Page 6. Receiving, inspection and acceptance report No. 111688 of complainant Roane-Anderson Company bearing the signature of said complainant's receiving officer and also bearing the approval of a representative of the Atomic Energy Commission.

Page 7. Supplement No. 1 to said receiving, inspection and acceptance report No. 111688 bearing signatures as aforesaid.

Page 8. Check No. 54005 issued by Roane-Anderson Company in payment for the property purchased.

Page 9. Reverse side of said check.

Page 10. First page of voucher No. 4015549 submitted by Complainant Roane-Anderson Company to the United States.

Page 11. Second page of voucher No. 4015549.

[fol. 99] Said Exhibit B does not cover all of the sales transactions between the complainants during November, 1947, but is typical of the handling of all such transactions.

By check No. 110981, the United States of America reimbursed the complainant Roane-Anderson Company for its expenditures made as aforesaid and which appear in the voucher submitted by said complainant and appearing hereto as pages 10 and 11 of Exhibit B.

² Exhibit B to this original bill consists of Roane-Anders son Exhibits 18, 19, 20, 21, 22, 24, 25, and 26, to which please refer.

Complainants aver that in each and every instance wherein Roane-Anderson Company purchased from vendors within the State of Tennessee, as well as vendors without the State of Tennessee, the title thereto became vested in the United States of America at the moment that title passed from the vendor. Under Article IX, paragraph 1 of the contract dated February 15, 1944, it is provided as follows:

"Title to all materials, tools, machinery, equipment and supplies which the Contractor purchases in accordance with Article I of this Contract and for which the Contractor shall be entitled to reimbursement under Article V shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be."

Complainants aver that the uniform and unvarying practice and custom of complainant Roane-Anderson Company and the Atomic Energy Commission in the performance of their said contract was that title to all procurements vested [fol. 166] in the United States of America at the moment of acquisition from the vendor, and from that moment, in every instance of a purchase, the property was treated as being the property of the United States Government. No insurance for the protection of such purchased property was taken out, in accordance with the policy of the United States Government which dispenses with insurance on Government property. The risk of loss of the property rested at all times upon the United States Government and not upon the complainant Roane-Anderson Company.

The complainant Roane-Anderson Company is expressly designated and declared by the said contract to be the agent of the United States for the performance of the above contract. Article I, Section 3 thereof provides as follows:

"In the operation of the facilities under this contract, and in the procurement of any and all supplies, materials, equipment necessary to the performance of the work hereunder, the Contractor shall act as Agent for the United States of America, it being understood and agreed, however, that all personnel and labor shall be and remain for all purposes the employees of the Contractor, exclusively, it being understood and agreed that the duties and functions of all such persons will be performed under the sole supervision and direction of the Contractor; provided, however, that employees engaged in the fire, guard and police patrols and forces shall perform their respective duties in accordance with the instructions and under the supervision of the Contracting Officer or his duly authorized representative."

VIII

Complainants particularly desire to call to the attention of the Court the provisions of Section 9(b) of the Atomic Energy Act of 1946, reading as follows:

[fol. 101] "In order to render financial assistance to those states and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to state and local taxation, the Commission is authorized to make payments to state and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the state or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the state or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any state, county, municipality, or any subdivision thereof."

The complainants allege that all of the transactions of Roane-Anderson Company and all of its acts entered into and performed under the contract above mentioned are activities of the Atomic Energy Commission within the intendment and purpose of Section 9(b) of the Atomic Energy Act of 1946, and that if the Tennessee Retailer's Sales Tax Act is construed as being applicable to the activities or transactions which are herein questioned that Act is invalid as applied because it is repugnant to the Atomic Energy Act of 1946 including Section 9(b) thereof and if construed as applicable to the activities or transactions as above mentioned is invalid as applied because it is repugnant to the Constitution of the United States.

IX.

The said tax paid to the defendant as above averred was paid under protest and duress and if it had not been paid, [fol. 102] process, either actually issued and in the hands of an officer, or in the defendant Commissioner's hands would have been levied against the property of complainants or one of them and sufficient thereof for the payment of said tax would have been seized. Said payment was the only way of averting such action. Said payment was wholly involuntary and was expressly made without prejudice to any and all rights of complainants to the recovery thereof and to establish immunity from and non-liability for such tax. The defendant Commissioner expressly accepted the payment of said tax upon all the conditions attached thereto, as just averred, and has expressly stated and agreed that such payment would leave available to the complainants the full right to sue for the recovery thereof without meeting the defense of voluntary payment, and that such defense would not and could not be asserted.

The Premises Considered, the Complainants Pray:

1. That process issue and be served upon the defendant and that he be required to answer or otherwise plead to this original bill but not under oath, his oath being expressly waived.

2. That a judgment be entered against the defendant Commissioner which will set forth that the transactions of the complainants, described in the foregoing original bill, and like transactions occurring since those described above, and occurring currently and in the future, are not subject to the tax provided for in the Tennessee Retailer's Sales Tax Act of 1947, and which judgment shall also entitle the complainants to have and recover of the defend-[fol. 103] and the sum of \$111.87 being the amount collected by the defendant from the complainants as a Sales Tax under said Act.

3. That upon the completion of the hearing and decision by the Court, a permanent injunction be granted the complainants which shall restrain the defendant and his successors in office from seeking to apply the said Act to the transactions of the complainants of the nature above described, and from seeking to recover from the complainants, or either of them, sales taxes provided for in the said Act.

4. For such other and general relief as the complainants may be entitled to.

Wilson-Weesner-Wilkinson Company, Roane-Anderson Company, by S. Frank Fowler, Solicitor.

Cates, Fowler, Long & Fowler, 1412 Hamilton Bank Building, Knoxville, Tennessee.

[fol. 104] Duly sworn to by S. Frank Fowler. Jurat omitted in printing.

[fol. 105] IN THE CHANCERY COURT OF DAVIDSON COUNTY

COST BOND OMITTED IN PRINTING

[fol. 106] In the Chancery Court of Davidson County

SUBPOENA TO ANSWER AND RETURN

State of Tennessee

To the Sheriff of Davidson County, Greeting:

We command you to summon Sam K. Carson, Commissioner of Finance and Taxation of the State of Tennessee, and Individually, if to be found in your county, to appear.

in person or by attorney before the Chancellor of Part Two of our Chancery Court at Nashville, on the 1st Monday in February, 1947, it being the 2nd day of February, 1947, there and then to answer the Original Bill of Complaint of Wilson-Weesner Wilkinson Co. et al., vs. Sam K., Carson, Commissioner, etc., and further do and receive what our said Court shall consider in that behalf; and this you shall in nowise omit, under the penalty prescribed by law. Herein fail not, and have you then and there this writ.

Witness, Jas. E. Covington, Clerk and Master of our said Chancery Court, at office in the Cour-house at the City of Nashville, Tennessee, this first Monday in October, 1947, and the 172nd year of American Independence.

Jas. E. Covington, Clerk & Master, by Emily Lord, D. C. & M.

Sheriff's Return:

Came to hand same day issued and executed by serving subpoena to Sam K. Carson, Com. of Finance and Taxation of State of Tennessee and leaving a copy with same. January 20, 1948.

Garner Robinson, Sheriff, by J. H. Alexander, D. S.

[fol. 107] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65164

WILSON-WEESNER-WILKINSON COMPANY ET AL., Complainants

VS.

Sam K. Carson, Commissioner of Finance and Taxation of Tennessee, Defendant

In Part II of Chancery Court, Davidson County, at . Nashpille, Tennessee

Answer to the Original Bill-Filed February 16, 1948

Comes the defendant, Sam K. Carson, Commissioner of Finance and Taxation of the State of Tennessee, and for answer to the original bill ffled against him in this cause does say:

1

For answer to the allegations of Section I of the original bill, defendant says:

Defendant admits that complainant Wilson-Weesner-Wilkinson Company is a Delaware corporation qualified to do business in Tennessee, with its principal office in Nash-ville, Tennessee.

Defendant admits that complainant Roane-Anderson Company is a Tennessee corporation, with its principal office at Oak Ridge in Anderson County, Tennessee.

Defendant admits that he is the Commissioner of Finance and Taxation of Tennessee and is charged with the duty of collecting, and as collecting the Tennessee Retailer's Sales

[fol. 108] Tax.

Defendant admits that he required complainant Wilson-Weesner-Wilkinson Company to pay sales tax as alleged in the concluding paragraph of Section I of the original bill, but he denies that his action in so doing was illegal or that complainant was not liable for said tax. To the contrary, he avers that his action in requiring the payment of said tax was lawful and that the complainant was liable for said tax. Defendant denies that complainants are entitled to an adjudication, in this suit, of their tax liability in regard to future transactions. Sections 1790 et seq. of the Code of Tennessee expressiv limit the relief available to complainants to suits to recover such taxes as may be paid under protest. Defendant expressly relies on said statutes as a bar to complainants' request for an adjudication of future liability.

II

For answer to the allegations of Section II of the original bill, defendant says:

Defendant does not know, so he neither admits nor denies the allegations that on February 15, 1944 the complainant Roane-Anderson Company entered into contract No. W-7401-ENG-115, Exhibit "A", with the United States of America, but demands strict proof of this allegation and all other allegations in Section I with regard to said contract.

He denies that the part of the contract exhibited contains all of the portions of the contract that bear upon the question presented in the original bill. He denies that purchases [fol. 109] made by complainant Reane-Anderson Company are financed initially by funds of the United States of America entrusted to the complainant for that purpose.

III

For answer to the allegations of Section III of the original bills, defendant says:

Defendant does not know, so he neither admits nor denies that the Roane-Anderson Company promptly entered upon the performance of the contract Exhibit "A", and has been engaged therein ever since, but demands strict proof thereof.

IV

For answer to the allegations of Section IV of the original bill, defendant says:

Defendant admits that the Atomic Energy Act of 1946 became a law in the latter part of the year 1946, and that the same provides for the transfer of all properties, etc. from the Manhattan Engineer District to the Atomic Energy Commission. He admits that on December 31, 1946 the President of the United States issued an executive order No. 9816 bringing about the transfer intended by Congress under the terms of said Act. He admits that if there was a contract between the complainant Roane-Anderson Company and the Manhattan Engineer District that the same became a contract between said complainant and the Atomic Energy Commission by reason of said executive order of the President of the United States.

[fol. 110]

U

For answer to the allegations of Section V of the original bills, defendant says:

Defendant admits that complainant Roane-Anderson Company has continuously purchased and will continue to purchase property taxable under the Tennessee Retailer Sales Tax Act. Defendant denies that the property so purchased and to be purchased by the complainant has been or

will be used by the United States. He avers that such property will be used only by complainant Rosne-Anderson Company.

For answer to the allegations of Section VI of the original bill, defendant says:

Defendant admits that during the month of November, 1947, complainant Wilson-Weesner-Wilkinson Company sold to complainant Roane-Anderson Company certain reinforcing steel, wire mesh, concrete carts and a shovel attachment, which were delivered to complainant Roans-Anderson Co. at the Chinton Engineer Works. He denies that the total consideration paid for reinforcing steel, wire mesh, concrete carts and a shovel attachment was \$5,593.68. He neither admits nor denies that said tangible personal property was acquired and used by complainant Roane-Anderson Company under its contract with the Atomic Energy Commission but demands strict proof thereof. Defendant supposes that Roane-Anderson Company paid complainant Wilson-Weesner-Wilkinson Company the amount of \$5,-593.68, together with the sam of \$111.87, but he denies that ffol. 111] the payment of this latter item of \$111.87 constituted the payment of the sales tax by complainant Roane-Anderson Company. To the contrary, he avers that the item of \$111.87 was a part of the purchase price and not the payment of a tax by complainant Roane-Anderson Company.

VII

For answer to the allegations of Section VII of the original bill, defendant says:

Defendant would show that on December 19, 1947, complainant Wilson-Weesner-Wilkinson Company paid the State of Tennessee the sum of \$111.87 but he denies that the same was paid by Wilson-Weesner-Wilkinson Company for Roane-Anderson Company. To the contrary, he avers that the same was paid by the complament Wilson-Weesner-Wilkinson Company pursuant to its own liability therefor under the terms of the Tennessee Retailer's Sales Tax Act.

He neither admits nor denies that all of said purchases of tangible personal property were handled by complainants in conformity with the procedure set out in said Section VII but demands strict proof thereof.

He denies that the title to said tangible personal property became vested in the United States of America at the moment the title passed from the vendor. He avers that any practice on the part of the employees of the Atomic Energy Commission contrary to the provisions of Article IX, paragraph 1 of the contract Exhibit "A" would be unlawful. He says that if it is the practice and custom of [fol. 112] such employees of said Commission to undertake to treat the title to procurements by complainant Roane. Anderson Company as bested in the United States of America prior to the final inspection, and acceptance or rejection, without written notice of acceptance or rejection as required by said Article IX, paragraph 1, that such practice and custom is void and does not have the effect of vesting title in the United States Government.

Defendant denies that complainant Roane-Anderson. Company is the agent of the United States in the performance of the contract Exhibit "A". To the contrary, he avers that said complainant is an independent contractor. He avers that it is beyond the power of the Atomic Energy Commission to constitute said complainant an agent of the United States and that any contractual attempt so to do is

ultra vires and void.

_VIII

Defendant denies that the transactions of the Roane-Anderson Company performed under the contract Exhibit "A" are "activities" of the Atomic Energy Commission within the intendment and purpose of Section 9(b) of the Atomic Energy Act of 1946. He denies that the Tennessee Retailer's Sales Tax Act would be invalid if construed as being applicable to the sale of tangible personal property in Tennessee, and is liable to pay the privilege tax levied against it by the Tennessee Retailer's Sales Tax Act at the rate fixed by said Act. He avers that the tax is levied upon complainant Wilson-Weesner-Wilkinson Co. for the privilege it exercises of selling tangible personal property, and [fol. 113] not upon complainant Roane-Anderson Co.

Defendant avers that the payment of an amount equal to the tax by complainant Roane-Anderson Company upon its purchase of tangible personal property from complainant Wilson-Weesner-Wilkinson Company does not amount to the payment of the tax by complainant Roane-Anderson Company. To the contrary of this, he avers that the amount equal to the tax which was paid by complainant Roane-Anderson Company to complainant Wilson-Weesner-Wilkinson Company was nothing more nor less than a payment by Roane-Anderson Co. of part of the purchase price.

Defendant would show to the court that Section 5(b) of Chapter 3 of the Public Acts of 1947, the Tennessee Retailer's Sales Tax Act, requires dealers, as far as practicable to add the amount of the tax imposed under the Act to the sales price, and provides that the same "shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts."

He avers that Section 5(b) of the statute was adopted by the Legislature to control unfair competition and to provide for a uniform impact of the tax act upon the retail economy of the State. He avers that this provision was adopted in recognition of the fact that the cost of all taxes paid by a seller, such as complainant Wilson-Weesner-Wilkinson Company, must be added to the sales price in order that the seller may survive. He avers that the mere fact that the [fol. 114] legislature undertook to regulate and control the manner in which the seller should take the tax into consideration in fixing the sales price of an article of tangible personal property cannot and does not amount to taxation of the purchaser.

He avers, since the incidence of the tax is upon complainant Wilson-Weesner-Wilkinson Company and not upon complainant Roane-Anderson Company, and since the cost of the tax falls upon complainant Roane-Anderson Company by virtue of the operation of a statute enacted in recognition of economic law rather than from the operation of the economic law unaided by statute, that the Tennessee Retailer's Sales Tax Act cannot be construed as taxing the activities of the Atomic Energy Commission, even if the buying of tangible personal property by complainant Roane-Anderson Company can be construed as amounting to an "activity" exempted by Section 9(b) of the Atomic Energy Act.

Defendant denies that a construction of the Tennessee Retailer's Sales Tax Act which would render complainant Wilson-Weesner-Wilkinson Company liable for the sales tax upon tangible personal property sold to complainant Roane-Anderson Company would be invalid as contrary to

Section 9(b) of the Atomic Energy Act or as repugnant to the Constitution of the United States.

IX

For answer to the allegations of Section IX of the original bill, defendant says;

[fol. 115] Defendant admits that said tax was paid under protest and that complainants are entitled to seek the recourse provided by Section 1790, et seq. of the Code. He denies, however, that complainants are entitled to an injunction as prayed, since to grant the same would be contrary to the express provisions of Section 1795 of the Code.

Defendant here and now denies every allegation of the original bill not hereinbefore admitted and prays to be

dismissed with his just cost.

Roy H. Beeler, Attorney General. William F. Barry, Solicitor General. Marry Phillips, Assistant Atty. Gen. Allison B. Humphreys, Jr., Advocate General.

[fol. 116] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65164

WILSON-WEESNER-WILKINSON COMPANY et al.

VA.

SAM K. CARSON, Commissioner, etc.

ORDER AS TO PROOF-April 7, 1949

This cause came on to be heard on the regular call of the docket, on April 4, 1949, before Special Chancellor Alfred T. Adams, and it appearing to the Court that the complainants have filed no proof, it is, therefore, ordered, adjudged and decreed that the complainants take and file their proof, within sixty days from the entry of this decree.

[fol. 117] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65164

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation

ORDER OF REVIVAL-August 31, 1949

Came the parties and suggested to the Court that Sam K. Carson no longer occupies the position of Commissioner of Finance & Taxation of the State of Tennessee, and that said position is now held and occupied by James Clarence Evans. Wherefore, upon motion of the parties and by their mutual consent it is Ordered first, that this cause be in all respects revived and continued against James Clarence Evans, Commissioner of Finance & Taxation for the State of Tennessee, and, second, that in the event this cause is not concluded during the tenure of office of said Evans, the same shall be revived and continued in all respects against the successor or successors in office of the said Evans, without the necessity of any further application by a party or order by the Court.

O. K. S. Frank Fowler, Solicitor for Complainant. Al-

lison B. Humphreys, Jr., Solicitor for Defendant.

[fol. 118] IN THE CHANCERY COURT OF DAVIDSON COUNTY

Rule No. 65164

WILSON-WEESNER-WILKINSON Co., et al.,

VS.

SAM K. CARSON, Commissioner, etc.

Order of Submission—September 23

This cause was heard before Alfred T. Adams, Special Chancellor, September 13, 1949 and former days of the term and was taken under advisement on that date.

Alfred T. Adams, Special Chancellor.

[fol. 119] IN THE CHANCERY COURT OF DAVIDSON COUNTY

WILSON-WEESNER-WILKINSON COMPANY and ROANE. ANDERSON COMPANY

SAM K. CARSON, Commissioner of Finance & Taxation

ORDER ON INTERVENTION-May 24, 1950

This cause came on to be heard this date upon the petition of the United States for leave to intervene in the above cause, and was argued by counsel.

Upon consideration whereof, the Court doth order and decree that the United States be and it hereby is granted

leave to intervene in this cause.

It is further adjudged, ordered and decreed, that the petition for intervention filed herein on behalf of the United States be and the same is filed in this cause as the intervening petition of the United States.

Alfred T. Adams, Special Chancellor.

[fol. 120] IN THE CHANCERY COURT OF DAVIDSON COUNTY.

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDERSON COMPANY

SAM K. CARSON, Commissioner of Finance & Taxation

PETITION OF THE UNITED STATES FOR LEAVE TO INTERVENE AND INTERVENING PETITION-Filed May 24, 1950

The United States of America, by its attorneys J. Howard McGrath, Attorney General of the United States, Theron L. Caudle, Assistant Attorney General of the United States, and Berryman Green as Special Assistant to the Attorney General, respectfully alleges that it has an interest in the matter in litigation, and in the success of the complainants, Wilson-Weesner-Wilkinson Company and Roane-Anderson Company, and, therefore, desires to become a party to the litigation by uniting with the complainants in furtherance of their claims, and as grounds therefor alleges:

I

That the intervention for which leave is prayed herein is authorized by the Attorney General of the United States at the request of the Atomic Energy Commission.

[fol. 121] I

That the Intervenor adopts and incorporates herein by reference all of the allegations and conclusions contained in the original bill herein.

Ш

That by reason of the facts so alleged your petitioner has an interest in this case which it is entitled to protect by intervention herein.

Wherefore, your petitioner, United States of America respectfully prays that leave be granted to it to intervene in this action; that an order be entered allowing intervention; and that this Petition for Leave to Intervene be considered and adopted by this Court as the Intervening Petition of the United States.

Your petitioner further prays that the judgment prayed for by the complainants in their original bill be entered and that the Court grant such other and further relief as it may deem proper.

J. Howard McGrath, Attorney General; Theron L. Caudle, Asst. Atty. General, by Berryman Green, Attorneys for the Petitioner United States of America.

[fol. 122] IN THE CHANCERY COURT OF DAVIDSON COUNTY

WILSON-WEESNER-WILKINSON COMPANY, et al.

VS

Sam K. Carson, Commissioner of Finance and Taxation of Tennessee

FINAL DECREE-August 29, 1950

Be it ever remembered that this cause came on to be heard on the 29 day of August, 1950, and former days before Alfred T. Adams, Special Chancellor, sitting by election of the Bar of Davidson County, Tennessee, in the place and stead of Honorable William J. Wade, Chancellor, who was unable to attend Court on account of illness, on the original bill and the exhibits thereto, including Contract No. W-7401-ENG-115, dated February 14, 1944, entered into between complainant, Roane-Anderson Company and the United States of America, together with all amendments to said contract through the 12th day of September, 1949; the answer of defendant; the depositions of witnesses and exhibits thereto; the intervening petition of the United States of America; and the entire record in said cause and upon consideration of all of which the Court finds, in addition to certain other findings of fact heretofore made, as follows:

That the Tennessee Retailer's Sales Tax, provided for by Chapter 3 of the Public Acts of the General Assembly of Tennessee for the year 1947, is a non-discriminatory excise tax on the complainant, Wilson-Weesner-Wilkinson Com-[fol. 123] pany, for the privilege of engaging in the business of making retail sales of tangible personal property in Tennessee. That complainant, Wilson-Weesner-Wilkinson Company, exercised this privilege in making sales of tangible personal property to its co-complainant Roane-Anderson Company, and was liable to pay the State of Tennessee the sales tax collected from it for which it sues in this cause. That complainant, Roane-Anderson Company, is an independent contractor with the United States of America under contract No. W-7401-ENG-115, dated February 14, 1944, together with the amendments and additions thereto through September 12, 1949. That this independent contractor relationship was not changed by Executive Order No. 9816 of

the President of the United States of America, effective December 31, 1946 transferring the supervision of said contract to the Atomic Energy Commission. That the complainant, Wilson-Weesner-Wilkinson Company, in exercising the privilege of making sales of tangible personal property in Tennessee to Roane-Anderson Company for use by it in its above referred to contract with the United States of America is not exempt from the sales tax levied by Chapter 3 of the Public Acts of the General Assembly of the State of Tennessee for the year 1947, by the doctrine of implied constitutional immunity of Eederal agencies nor by reason of the exemptions contained in Section 9(b) of the Atomic Energy Act of 1946 nor for any other reasons claimed in. the original bill of the complainants and the complainant, Roang-Anderson Company, is not authorized to purchase [fol. 124] tangible personal property from the complainant, Wilson-Weesner-Wilkinson Company, for use by it in its above referred to contract with the United States of America without the payment of the equivalent of the sales tax required to be added to the purchase price of said tangible personal property by said Chapter 3. That the allegations of the original bill are fully met and overcome by the defenses raised by the answer and established at the hearing, and said bill should be dismissed at the cost of the complainants. That the intervening petition of the intervenor, the United States of America, which has been fully considered, should, likewise, be dismissed, but without cost to the intervenor.

It is accordingly ordered, adjudged and decreed, for the reasons stated in the opinion of the Court filed herein and authenticated by the signature of the Special Chancellor, which is ordered made a part of the record herein, and on the findings of fact made by the Court, that complainants' original bill be and the same is hereby dismissed at the cost of complainants for which execution may issue. The entervening petition of the intervenor, United States of America, is likewise dismissed but without cost.

The copies of the public documents here listed which were delivered to the Court by complainant of which judicial notice was taken, are ordered filed and made a part of the record:

Hearings before the Committee on Military Affairs— House of Representatives—Seventy-Ninth Congress, First Session on H. R. 4280, October 9 and 18, 1945. [fol. 125] Hearings before the Special Committee on Atomic Energy, United States Senate—Seventy-Ninth Congress—Session on S. 1717, Part 1 and Part 3.

Hearings before the Special Committee on Atomic Energy, United States Senate—Seventy-Ninth Congress, First Session pursuant to S. Res. 179, Parts 1 and 3.

Hearings before the Joint Committe on Atomic Effergy, Congress of the United States—Eighty-First Congress, First Session on Los Alamos, Retrocession Bill and AEC Contract Policy.

Senate Document No. 96—80th Congress, 1st Session—Letter from the Chairman and Members of the United States Atomic Energy Commission.

Report No. 1211-79th Congress, 2d Session, Senate Atomic Energy Act of 1946.

Report No. 1186—79th Congress, 1st Session—House of Representatives—Atomic Energy Act of 1945, and Part 2 of Report No. 1186.

To the action of the Court in dismissing complainants' original bill and taxing them with the cost, and in dismissing the intervening petition of the United States of America, and to the findings of fact made, and all adverse action taken, both complainants and the intervenor except and pray an appeal to the next term of the Supreme Court of Tennessee sitting at Nashville, which appeal is granted to the intervenor United States of America, without condition, but is granted to the complainants Roane-Anderson Company and Wilson-Weesner-Wilkinson Company only on the condition that within thirty days they execute and file with the Clerk and Master an appeal bond in the amount of \$250.00 conditioned as provided by law. It is ordered that all exhibits on file in this case, including the public documents listed above, shall be sent up to the Supreme Court in original form in event appeal is perfected.

Enter:

Alfred T. Adams, Special Chancellor.

[fol. 126] IN THE CHANCERY COURT FOR DAVIDSON COUNTY APPEAL BOND—Omitted in Printing

of fol. 127] In the Chancery Court of Davidson County

8

No. 65015

ROANE-ANDERSON COMPANY

VS.

, Sam K. Carson, Commissioner of Finance & Taxation

and

No. 65164

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDER-SON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation.

STIPULATION AS TO EVIDENCE—Filed June 10, 1949

In this cause for the purpose of simplifying the introduction of proof and expediting the cause it is stipulated that the complainants may introduce in evidence, without objection the following portions of the document published by the United States Government popularly known as "the Smyth report", which is formally entitled, "A General Account of the Development of Methods of Using Atomic Energy for Military Purposes under the Auspices of the United States Government 1940-1945," by H. D. Smyth, publication authorized as of August 1945:

Pages 20 and 21, paragraphs 1.60, 2.1 and 2.2.

Page 27, paragraph 2.27.

Page 29, paragraph 2.34.

[fols. 128-128a] Page 30, paragraphs 2.36 and 2.37.

Page 59, paragraphs 5.23 and 5.24.

Pages 61-62, paragraphs 5.32-5.34, inclusive.

Pages 79-81, paragraphs 7.4-7.13, inclusive.

Pages 102 to 104, inclusive, paragraphs 8.34 to 8.48, inclusive.

Page 110, paragraph 8.70.

Page 125, paragraphs 10.1 and 10.2.

Pages 127 to 135, inclusive, paragraphs 10.9-10.42, inclusive.

Chapter XI, Pages 136-149, inclusive, paragraphs 11.1-. 11.48, inclusive.

It is further stipulated that the complainants may introduce in evidence, without objection, pages 1 to 22 (middle of page) of report published by the United States Atomic Energy Commission and published by the United States Government printing office entitled, "Atomic Energy Development 1947-1948."

This 7th day of June, 1949.

S. Frank Fowler, Solicitor for Complainants; Allison B. Humphreys, Jr., Solicitor for Defendant.

[fol. 129] IN THE CHANCERY COURT AT NASHVILLE,

No. 65915

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation

and

No. 65164

WILSON-WEESNER-WILKINSON Co., and ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation

Bill of Exceptions

The depositions of Charles Vanden Bulck, George Horr, Ralph Callahan, Walter H. Leedom, Noble J. Holland, Dwight H. Smith, J. P. Fulghum, taken by consent of parties of hehalf of the complainants in the above named causes, and the United States of America, which has declared its intention to intervene in these proceedings, said depositions being taken at the Administration Building in Oak Ridge, Tennessee on December 13, 1948 at 10:15 a.m., [fol. 130] in the presence of Ralph Callahan, representing Roane-Anderson Company; S. F. Fowler, Solicitor of record for the complainants; Allison B. Humphreys, Solicitor of record for the defendant; Berryman Green, of the Department of Justice of the United States of America; Harold L. Price, Assistant General Counsel, Atomic Energy Commission; and O. S. Hiestand, Attorney for the Atomic Energy Commission.

All formalities as to caption, certificate and transmission are waived and it is agreed that said depositions, after the witnesses have been duly sworn, may be taken in shorthand by A. C. Dore, Court Reporter and that he may thereafter transcribe the same, sign the names of the witnesses hereto and may also sign the name of the notary public whose

signature and seal are expressly waived.

It is further agreed by the parties, acting through their counsel of record, that a single set of these depositions shall be filed in both of the above-captioned causes; that these two causes shall be consolidated so far as the introduction of evidence and trial are concerned and that the Court may enter an appropriate order so providing.

For the information of the Court, counsel for the parties jointly state that the issues presented by these causes have been the subject of conferences and negotiations between the State of Tennessee, the Atomic Energy Commission and [fol. 131] the Department of Justice of the United States.

It was agreed that the amount of the Sales and Use Taxes would be paid monthly, as provided in the Sales Tax Act, and test litigation instituted to determine whether the Sales and Use Taxes are applicable in the transactions involved in these cases and similar transactions. The outcome of such litigation also is to determine whether the taxes paid to the State shall be refunded.

It is not the intention by this statement to vary or modifythe agreement, but to indicate its existence and general nature.

The declaration by the United States Government of its intention to intervene, and the taking of these depositions

by agreement does not waive the right of the State of Tennessee and the Commissioner of Finance & Taxation of the State of Tennessee to object to the intervention of the United States Government or its effort to intervene.

Mr. Humphreys: I may rely, in the course of the trial on the best evidence rule and the hearsay rule, which was

not included.

Mr. Green: Do you run that to these depositions of the contractor?

Mr. Humphreys: No. I don't apply it to anything of that character that I know about but what I don't know and [fol. 132] what somebody says he has heard I am not going to agree to.

(The rule as to the exclusion of witnesses was called for and Mr. Callahan stayed in the room as representative of Roane-Anderson Company.)

The first witness, Charles Vanden Bulck, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your full name, age and occupation.

A. Charles Vanden Bulck, 44, special assistant to the Manager of Oak Ridge Operations.

Q. You live in Oak Ridge?

A. I do.

Q. How long have you held the position with the Atomic

Energy Commission that you have mentioned?

A. In the capacity of special Assistant to the Manager since June of this year. I have been employed by the Atomic Energy Commission since they took over the Manhattan Project on January 1st, 1947. At that time, I was head of the Administrative Division which comprises practically the same duties I have today except that I had operating responsibilities.

[fol. 133] Q. Your duties then were broader than they are

now?

A. Only in the fact that I had specific responsibility for operations, of Operation Offices Division whereas now I serve entirely in the capacity of a staff assistant.

Q. Describe briefly the kind of work that you are engaged in from day to day.

A. Currently or back in January?

Q. Let's start with the current situation.

A. Well, today I am the Chief Co-ordinator with regard to the negotiations with contractors with the Oak Ridge Operation as to entering into that for its operations. When I say "all" contractors I refer to those that are not let as a result of competitive bidding.

Q. What other duties?

A. In addition to that I serve on a number of Boards and Committees for the Manager, some of them having to do with the incorporation of the town, land used in the town. I serve currently on the Board in connection with investigation of personnel under the Loyalty Provisions of the Atomic Energy Act. I handle special investigations for the Manager as administrative assistant.

Q. Now, Mr. Vanden Bulck, I think that gives us enough of an idea rout your present job. Did you discharge those same functions for the Atomic Energy Commission begin-

ning January 1, 1947?

[fol. 134] A. No, on January 1, 1947 I was the Chief of the Administrative Division which involved broad supervision over the Fiscal Branch, the Contract and Legal Branch, the Property Accountability Branch, and the Government Civilian Personnel Unit. That's about all.

Q. Before January 1, 1947 by whom were you employed.

and what were your duties?

A. From September, 1946 when I got out of the Army, I resumed the same position I had while I was in the service in a civilian capacity, which involved the same duties I have just listed as of January 1.

Q. Were you a civilian employee of the Army from Sep-

tember 1, 1946 until January 3, 1947?

A. That September 1st date I am not too sure about but it was in September when I took—it may be August of that year—somewhere in there that I took up my actual duties in a civilian capacity. I got into the Army in October, 1942. At that time I was furloughed from my civilian job with the Manhattan Project. I served for a period of about four years in the Army with the Manhattan Project.

Q. You say you got out of the Army in 1942?

A. No, 1946.

Q. You say you went into the Army in 1942?

A. That's right.

Q. Where were you employed before 1942?

[fol. 135] A. I have been employed by the Corps of Engineers since December, 1923.

Q. In a civilian capacity as of that date?

A. In a civilian capacity as of that date until the time I was furloughed and got into the Army.

Q. What was the Manhattar District, Mr. Vanden Bulck?

A. The Manhattan District was a special division organized nominally under the Chief of Engineers of the Army to carry on the construction work and the research incident to the completion of the project which was the production of the atomic bomb.

Q. In the course of your employment by the Corps of Engineers were you brought into contract with this project

for the development of fissionable material?

A. Yes, in June, 1942 I was employed by the Syracuse District, at Syracuse, New York, and as a result of a special meeting called by the District Engineer, Colonel James C. Marshall, we met in his office one Sunday in June, 1942 and he advised us that a special project had been assigned to the Syracuse District the extent of which he was unable to reveal to us at the time, but it was important enough for him to hand-pick his organization and start up working as a separate unit, separate and distinct from what was under the control of the Syracuse District, and we operated in that capacity until August 15, 1942, Phelieve it was when the official order was issued by the War Dapartment establishing the Manhattan District.

Q. Was there a separate appropriation for the Manhattan District?

A. No, the initial appropriation was disguised and came from what was then surplus funds or extra funds available to the Corps of Engineers, and we retained that Engineers' appropriation until June, 1946 with the War Department appropriation labeled "Atomic Services" as part of the War Department, it became a part of the appropriation Bill.

Q. Do I understand that the funds which enabled the Manhattan District to operate were concealed so to speak in funds of the Army, the Army Appropriation?

A. That's correct. The Corps of Engineers had avail-

able to it funds which were labeled "Engineer Services, Army", which were the funds which we first started out with. Subsequently, they also received an appropriation labeled "Expediting Service and Supply" and it was between those two types of funds that we drew all of the funds necessary for the project.

Q. Can you tell us the purpose of so hiding the funds of the District?

A. Yes, the project we were on was such that the enemy forces with whom we were at war were not to get any indication of how extensive the American Government was [fol. 137] pursuing the atomic energy project and our normal procedure requires the review of objectives by various Appropriation Committees in Congress, and the public records made thereof are available to anyone that wants to buy them, and the orders with regard to this project were that nothing would be done to disclose its purpose or the fact that it even existed, which was one of the reasons why we put the fence around this area.

Q. Did the General Accounting Office have anything to

do with the Manhattan District?

A. In the early stages, no. We refused to give the General Accounting Office any information, and finally we decided to bring them in because of the tremendous backlog of auditing that they would have to perform, and I believe that that was somewhere in February 1943 or '44, I am not sure which, that we actually invited the General Accounting Office to establish an office at this location and at Richland, Washington. We at that time had a backlog of in excess of ninety thousand vouchers that we had paid out which had not been released to them at all. They had been kept here.

Q. Mr. Vanden Bulck, was GAO invited to establish offices at the two places you have mentioned because of their jurisdictional right, you might describe it, or simply as an extra protection to the AEC or rather the Manhattan District?

A. Well, under the law that the Comptroller General's Offices established he has the right to review, for the pur[fol. 138] pose of compliance with the appropriations, all of the expenditures made by Government Agencies. It acted both as a protection to the contractor and to the Government Agency and the Manhattan District which main-

tained the payments as currently as possible. I would like to enlarge on that a little bit, Mr. Fowler. In order to protect the contractor from the reopening of some of these expenditures at a later date, and the possibility of him being assessed for reimbursements made to him or of having certain of these reimbursements disallowed, we deemed it in the interest of all concerned to bring the General Accounting Office in.

Q. Mr. Vanden Bulck, was this Oak Ridge project or whatever you call it, the Clinton Engineer Works, estab-

lished by the Manhattan District?

A. Yes.

Q. Can you tell us the requirements to which the property had to conform in general in order to meet the desires of the Manhattan District?

A. May I ask this question: Do you mean the area itself?

Q. Yes, the physical necessities of the situation?

- A. What we knew of the technical processes involved at that time indicated that we must have a tremendous supply of electric power in order to operate the plants. We also had to find an area that was isolated chough so as to permit the use of natural barriers and our own implementation to keep the general public off the area and prevent any knowl-[fol. 139] edge from getting out.
 - .Q. Did you also need water?

A. We needed water, yes.

Q. So you have named isolation and electric power and water as being the three prime necessities?

A. That's right.

Q. When was this project established here?

A. I believe the first filing on the taking of the land took place in late July or early August, 1942, because I remember particularly Mr. Cline, who was the Chief Engineer for Stone & Webster, and who was responsible for the construction of the town and the Y-12 plant area, calling me and asking that I arrange for certain takings through the Ohio River Division. That is the earliest date. The actual name for the area, Clinton Engineer Works, did not come into existence until later.

Q. What do you mean by the Ohio River Division?

A. The Corps of Engineers has its real estate acquisition procurement de-centralized to where each one of the division offices scattered throughout the country had as a

part of their operation a real estate section to acquire land, which the War Department disposed of when it became surplus.

Q. And that agency was the Ohio River Division?

A. The Ohio River Division was responsible for this area.

Q. Did the United States acquire the land comprising

[fol. 140] this project area?

A. They did. Some of this they immediately purchased through negotiated sale. In other cases they had to file condemnation proceedings.

Q. Can you tell us the size of the area?

A. Somewhere around 55,000 or 56,000 acres.

Q. Can you tell the purpose of this acquisition by the United States?

A. The purpose was so that they would have sufficient land and sufficient isolation to construct a plant and town remotely enough located from the plant area so as to be a protection to the residents in case something went wrong or to give the plant the isolation it needed to prevent the public from seeing it.

, Q. What activity was to be carried on in the area?

A. There were three operations contemplated for this area. The first one that was started was the electromagnetic separation process. The second one was the experimental plant which today is known as Oak Ridge National Laboratory but was actually a forerunner for the production plants that they actually constructed, and the third the gaseous diffusion process which is known as K-25 and operated by Carbon and Carbide Chemical Corporation,

Q. All of this is related to fissionable matter?

A. That's correct. Fissionable material as we know it [fol. 141] today comes in two forms: One in the form of plutonium which is produced at Hanford and the other U-235 which is extracted in either the electro-magnetic process or the gaseous diffusion process.

Q. Was all of this activity related to National Defense?

A. Yes.

Q. What was the stage of learning and also the stage of manufacture in those early days of the Oak Ridge Project! Did people know what they were doing with assurance!

A. No, not all the people. Some of the scientific person-

nel knew because they were responsible for the invention of the process.

Q. Did they even have well-laid-out and tested methods

of procedure in dealing with fissionable materials?

A. No, because the entire history of fissionable material was comparatively recent. It was probably the largest calculated risk anyone ever took. All of our contracts in connection with plant operation specifically provided that the operator did not guarantee that he could or would produce anything; that he would do the best he knew how in operating the plant and producing the material the Government wanted but he never guaranteed that he would produce it because he was not familiar with any prior processes of separating fissionable material from its basic ingredient, uranium.

Q. Were these operations at Oak Ridge carried on under

[fol. 142] risk of injury?

A. Yes, all operations were carried on on that basis, but early in the game the people who were responsible for the health of personnel working with this material were fairly well familiar with some of the peculiarities of the material and we took what we considered then the precautionary measures and all precaution ry measures we could possibly take to protect them to the Nth degree, and actually we found out that the confidence we had placed in the Health Physicalts was not misplaced because our record here is enviable from that score.

Q. Can you tell us whether or not there is any common provision in the contracts for the operators which holds them harmless, and if so who suggested that, what was the

origin of the provision?

A. It originated with the negotiation of the contract with the DuPont Company. They actually were requisitioned for the job at Hanford and for that portion of the work that they did down here. Under the terms of the powers vested in the President by the War Powers, Act, anything or any service could be requisitioned, and he would make suitable terms for payment. The DuPont Company insisted upon a complete "hold harmless clause"; as they pointed out, there is no previous experience or skill in regard to operating the plants or producing the materials, and they felt that they should not take such a risk strictly on their own ability. They had to have assurance by the [fol. 143] Government that regardless of what happened

the Government would pay the bill. That clause in the contract was submitted to the General Accounting Offices for their prior review, because we had doubt as to whether we were in position to write such an article in the contract, and the General Accounting Office concurred and permitted us to use it in view of the special nature of the project. To answer your question specifically, it was included in the contract with Tennessee Eastman Corporation, with Carbide and Carbon Chemical Corporation and the DuPont Company for the construction of the laboratory plant here and subsequently in the contract with the University of Chicago which operated the plant and in turn in the contract with Monsanto who took over the operation in July, 1945.

Q. You say that same provision?

A. That same general "hold harmless" provision was included in all contracts.

Q. You say originally DuPont insisted that such provision be inserted. Why was DuPont in position to be able to insist?

A. I assume that DuPont wanted to give its wholehearted cooperation without a thought that it was exposing itself as well as personnel to hazards of which it had no knowledge, in addition to which the technical nature of the plant was such that they did not know how far the public might be involved in any unusual happening in the plant, whether from the possibilities of explosion or noxious gases or other hazards.

[fol. 144] Q. Did the United States find itself in position, where it had to avail itself of private organizations such as

the DuPont Company?

A. Yes, because the United States Government in its operations of the Government is not experienced as a chemical operator. It operates no plants for any of its services except some arsenals. It gets all of its powders and explosives produced by private interests, and in the main it needed the type of people that only private industry could supply. In that I am talking about chemists, physicists, metallurgists and so forth.

Q. What do you mean by the expression "DuPont was requisitioned"?

A. They were ordered by the President of the United States to take the job.

Q. Did DuPont want the job?

A. No, in fact they had a provision in their contract that permitted them to get out of the operation just as soon as hostilities ceased, that is, active warfare, not just a question of waiting until the Peace Treaty was signed but as soon as the shooting war stopped, DuPont wanted to get out.

Q. What compensation did the DuPont Company ask for

in connection with their operations?

A. They asked for reimbursement of all of their costs plus a fee of one dollar. In the reimbursement of all of their costs they were paid all direct expenses plus an over-[fol. 145] head allowance to cover indirect expenses of their home offices, company plants and so forth, with the express provision in the overhead clause that if the DuPont Company, after it examined its experience, found that the overhead allowance was excessive they would return volun-

tarily the excess to the Government.

Q. Mr. Vanden Bulck, I want to call your attention to the document known as the Smyth report which is a publication printed in the United States Government Printing Office bearing the title, "A General Account of the Development of Methods of Use of Atomic Energy for Military Purposes under the Auspices of the United States Government, 1940-1945." This was written by H. D. Smyth. It is likely that General Humphreys and I will reach an agreement as to what parts of this book the Court may take judicial notice of. Let me ask you, Mr. Vanden Bulck, wherever in this report there is a reference to the Clinton Project or the Clinton Engineer Project or area or Oak Ridge Project do all such references relate to this project in which we are presently which has been commonly known as the Clinton Engineer Project?

A. Mr. Fowler, I have never read the report. I don't know whether those references are correct. I assume they are correct. I suppose the report was proofread before submission to the printer so I think that we can assume that

that is probably true.

Q. Have you heard of any other Clinton project in the [fol. 146] program of the Manhattan Engineer District?

A. No.

. Q. Or any other Oak Ridge Project?

A. No.

Q. Now coming more specifically down to the subject

matter of these causes, did you participate in the formation and execution of the contract between the Manhattan District and Roane-Anderson Company?

A. Yes.

Q. Can you tell us a little bit of the early contacts between the parties which later resulted in the execution of the con-

tract and of the general circumstances?

A. The Town of Oak Ridge was built and ready for occupancy beginning somewhere around August, 1943. That may be 30 or 60 days off in the actual moving of people onto the area and putting them in houses, but the Government at that time was running the town, and like everything else. with the number of contractors involved it was felt that the Government would want to turn over to a contractor the operation of the City of Oak Ridge which included the operation of the water pumping station, filtration plant, electric distribution system, maintenance of roads and streets and maintenance of real estate. It would have resulted in the Government hiring a tremendous number of people, which the Manhattan District could not hire because it had personnel restrictions imposed upon it because it was a part of the Corps of Engineers. Therefore, the operation had to [fol. 147] be conducted by contract. That is not to be confused with the type of operation that is prevalent in our plants where technical know-how was needed and other types which the Government could not command. The Corps of Engineers has engaged in numerous projects and operated small towns in connection with some of its water storage areas and has had some experience in town operation, but because it could not get the number of people it needed it was determined to get a contractor in on the scene and have him operate the town under a direct contract with the Government. The District Engineer, Colonel Nichols, at one time asked me for my opinion with regard to getting the Turner Construction Company to operate Oak Ridge. The reason for that was that both he and I had had considerable experience with the Turner Company on the construction of the Rome Air Depot in upstate New York, where the Turner poeple had constructed an airstrip and numerous buildings, including an engine test building, and so forth. Our experience and relationship with them was such that we desired very much to have someone of that caliber come in here and operate this town, and we subsequently get together with representatives of the company and we then made and negotiated the details of the contract.

Q. The contract between the parties was initiated by

Colonel Nichols acting for the United States?

A. That's correct.

[fol. 148] Mr. Green: And Manhattan District.

The Witness: I don't believe that the Turner Construction Company ever approached Colonel Nichols with the idea in mind that they wanted to operate the town.

Q. What was the attitude of Turner Construction Com-

pany when approached?

A. At first they were not very enthusiastic about it, but I believe that Colonel Nichols, because of his knowledge of the people comprising the organization, was able to convince them that they should do this, that in so doing they were helping us out and making a justifiable contribution to the war effort.

Q. Did the Turner Construction Company then cause the

incorporation of Roane-Anderson Company!

A. Yes, the Turner Construction Company, as the name implies, is a construction company which has affiliations with the unions covering the labor on construction jobs which is the AFL. Coming into an operation such as this it could hardly be construed as a construction job, and different rates of wages would be paid than would be paid for construction work and accordingly they decided, in order and to have their relationship jeopardized on other work that they were doing as constructors, to set up a separate corporation to handle this operation.

Q. Can you tell us in fairly brief fashion just what kind [fol. 149] of work Roane-Anderson Company has done here

under this contract?

A. Yes, I think I can. They maintain all of the streets in the town and the roads up to the plants. They operate the water pumping station and the filtration plant; they are responsible for the maintenance of the electric distribution system in the town and incidentally operating the water plant involves the water distribution system of the town; they operate the town sewage plant and its distribution system; they act for the Government in the letting of concessions and all needed services that a town of this type needs. They at one time operated the dormitories subsequently placed there on a concession basis; they operated the cafeteria, placed that on a concession basis. Later on they operated the guest house and put it on a concession basis at a later date. They also maintained all of the Government buildings in the town and have from time to time under special arrangements handled construction work for the Government on a sub-contract basis. They also hire on their payroll the police force of the town, but the actual control of the police force is direct-by the Government. They likewise hire all of the Fire Department personnel which in turn is directed by the Government. They also hired all of the personnel that operate the hospital but who are under the direct supervision of the Medical Director of the Government.

Q. All of those things were done under the contract re-

[fol. 150] ferred to in the original bill in this case?

A. Yes, I may add that they also operated the bus system on the area which includes the town transportation system and the bus system between the town and the plants and subsequently that was cancelled out and a separate contract was entered into with American Industrial Transit.

Q. What, if any, municipal services do Roane and Anderson Counties furnish within the Clinton Engineer Area?

A. The only services that I know of are due to the arrangements with the two counties involved that in the event of the apprehending of an individual who commits a crime or misdemeanor and comes under the Tennessee State Laws, he is arrested by one of the policemen of Roane-Anderson Company, but who also has been given arresting powers due to the fact that they are deputy sheriffs of both of the county sheriffs involved, and then the individual is then turned over to the county for whatever action is required in the case.

Q. Who maintains the schools and streets, for instance, within the area?

A. The streets are maintained by Roane-Anderson Company. The schools are maintained by Anderson County under a direct contract with the Commission or the Manhattan project, and we reimburse all of the costs of that operation.

Q. Now in your testimony you have referred to streets within the area and roads within the area leading up to the [fol. 151] plants. Who owns those streets and roads?

A. To the best of my knowledge the United States Government.

Q. You have mentioned water plants, and electric and water distribution systems. Who owns those?

A. All of that was owned by the Government.

Q. Is the same thing true of the sewage plant and distribution system and the dormitories and the cafeterias, the

Guest House and the other to which you referred?

A. Yes, there is only one qualification I could make in that, although it still is Government ownership, and that is some of the Tennessee Valley Authority high lines going through here that are owned by Tennessee Valley Authority, but that is also a Government organization.

Q. Did you have any participation or direct knowledge concerning the entering into of the contract with Carbide

and Carbon Chemical Corporation!

The work I did was started in New York and was finally concluded after we had moved our headquarters office to Oak Ridge.

Q. Who negotiated the cont-act there?

A. I believe it was General Groves who contracted Mr. Rafferty who was Chairman of the Board of Union Carbide Company.

Q. What was the attitude of Mr. Rafferty or his com-

o pany?

A. Mr. Rafferty wanted very much to undertake the oper-[fol. 152] ation for the Government. It was a new field in which they had had no experience, and they realized that such service as the type that they could furnish was necessary after the general inception of the process was explained to them, and he agreed that Carbide and Carbon would do everything in its power to help out.

Q. Did you participate in the actual formulation of the Carbide & Carbon contract as well as the Roane-Anderson

contract?

A. Yes.

Q. I believe that the original Carbide & Carbon contract refers to plant K-25; is that correct?

A. Yes.

Q. You have also referred to the Oak Ridge National Laboratory, which is commonly referred to as X-10. Whom was the initial contract awarded to?

A. The construction of that was with DuPont. The first

operations, that contract was with the University of Chicago until June 3rd, 1945 at which time Monsanto took over the operation and they operated until February 29th of this year.

Q. At that time it was taken over by Carbide & Carbon?

A. Yas.

Q. Did you participate in the formulation of those contracts with the operating companies and the University!

- A. Yes.

[fol. 153] Q. There has also been a reference to Y-12. What is that, the electro-magnetic process?

A. The electro-magnetic separation plant operated by

. Tennessee Eastman Corporation of Kingsport.

Q. Did you participate in the negotiations, in the formulation of the contract with Tennessee Eastman?

A. Yes.

Q. Was that plant later turned over to Carbide & Carbon?

A. That's correct. As the process went along the decision was to actually improve the gas diffusion process to the point that they no longer needed the electro-magnetic separation process.

Q. And thus we are correct in understanding that you participated in all of the negotiations for the contracts and with the people that I have named, Roane-Anderson Company and these three plants?

A. Yes.

Q. Can you give us the sense of urgency or pressure attending the formulation of the contracts and whether or not the doing of the work awaited the completing of a formal contract!

A. No, in each case we got the work started by issuing what was known as a letter contract, or letter of intent, which indicated the Government's intention to enter into a more definitive contract just as soon as the scope of the [fol. 154] work could be established and the various administrative requirements of the contract made definitive enough to put in a written document. The contracts in most cases were entered into long before the plants were actually completed, because they all involved the employment of large numbers of personnel that needed training. All those people were trained while the plants were actually being constructed, so that when the key was turned over to the

operator they had a group of people in position to go in and;

operate the plant.

Q. Were the formal contracts prepared in a leisurely fashion and with deliberation or was there some atmosphere of haste?

A. The formal contracts, if you will go back and check some of those, sometimes were dated almost a year after the letter contract was first placed with the company, because of the number of negotiations we had to have with the organizations to get an agreeable document to both sides.

Q. What were the sources of the various provisions under

these contracts?

A. To a great degree they originated in the standard form contract that the War Department had prepared and used in its general operations in connection with the work. They had standard forms for construction of that operation for architect and engineer work, and we used applicable phrases from those contracts.

[fol. 155] Q. This "hold harmless" provision was that

included in that type of contract?

A. No.

Q. Has experience pointed out any provision- in the contract which were really irrelevant or not designed for the actual situation developed here?

A. Could you be a little more specific on that, Mr. Fowler?

Q. What I am trying to inquire about is whether under the haste and pressure of the war situation, these contracts in some particular may simply amount to a collection of provisions from antecedent contracts which might have related to different kinds of situations or operations?

A. Why, in general we had a fair idea of what the operation involved, and while as I stated before, a lot of the phrase logy had its origin in War Department contracts, we were not bound by the normal regulations of the War Department and changed the wording to a considerable degree

to suit our immediate needs.

Q. Well, we will come to one or two of the provisions that I have in mind. Mr. Vanden Bulck, did you participate in the formulation of other contracts which entered into the care and maintenance of this project area, such as Stone & Webster's and all of the rest of them?

A. Yes, I was one of the original parties to the Stone &

Webster contract.

Q. Were there few or many of such other contracts B [fol. 156] A. There were quite a number of them although we attempted to place major contractors with known industrial operations and thus permit them to handle most of the phases under the operation by sub-contract.

Q. Is there or was there any counterpart in industry for

the operations here conducted?

A. No, there was not.

Q. I am going to ask you to file the Roane-Anderson Company contract in the Roane-Anderson Company cases as Exhibit No. 1, and to file in the Carbide & Carbon cases the Carbide & Carbon Chemical Corporation contract as Exhibit No. 1 in those cases.

Mr. Green: It is stipulated and agreed by all of the parties hereto that as to the area constituting the Oak Ridge plant or the Clinton Engineer Works lying and being in Roane and Anderson County, Tennessee, the State of Tennessee retains all of its original jurisdiction and rights thereto and therein.

Mr. Humphreys: There is no element or question of cession involved in this case?

Mr. Green: None whatever.

Mr. Humphreys . That clears that phase of it up.

Mr. Green: It is stipulated and agreed that George Horr, President of Roane-Anderson Company and Vice-President of Turner Construction Company is present, and upon [fol. 157] examination would corroborate Mr. Vanden Bulck in his statement relative to the preliminary negotiations between the Manhattan District, and Roane-Anderson Company and Turner Construction Company and the mutual, execution of the contract. That is agreed to generally.

Mr. Humphreys: Do you want to state that he would testify to the operations of the company to the same effect?

Mr. Green: Yes, add that to it.

Mr. Fowler: As to all of which Mr. Horr has personal knowledge.

Q. Mr. Vanden Bulck, I therefore ask you to file as Exhibit 1 to the proof of the complainants in the two Roane-Anderson cases the contract, being contract No. W-7405-ENG-15 referred to in the original bills which was dated

February 14, 1944, said Exhibit 1 also to include 15 modifications thereof each bearing a separate number.

A. I would like to add to that that while the contract was dated February, 1944, its effective date was somewhere in

November, 1943.

Q. Further describing Exhibit 1, each of the modifications sets forth the contract number above stated and then is entitled "Modification No. so and so." I hand you Exhibits has thus described and ask you if that is an accurate copy of [fol. 158] the contract and modifications described?

A. That is an accurate copy and the reason I know it is is that I personally had this copy prepared by our photographic reproduction group from the original contract on

file in the General Accounting Office.

Q. Will you file it as Exhibit 1 to your deposition? A. I do so.

Mr. Humphreys: You have checked it since it was pre-

The Witness: My writing is up on top showing it as Exhibit "A".

Q. These same papers which compose Exhibit No. 1 were filed as Exhibit "A" to the original bill?

A. That's correct.

- Q. Dogou file it as Exhibit No. 1 to your deposition? A. I do.
- Q. Now, in the two Carbide & Carbon cases will you file as Exhibit 1 to your deposition in those causes, the contract and modifications which were filed as Exhibit "A" to the original bill, being contract W-7405-ENG-26 with modifications each bearing the contract number fust given, and they being described as "Supplemental Agreement number so and so", being the first 21 modifications to the contract? Will you file all of those as Exhibit No. 17?

A. I have previously filed these as Exhibit "A" in con-[fol. 159] nection with the original bill; isn't that right?

Q. That's right. Those are the same identical papers. A. I do so. There is one of them No. 20 which is missing,

that has never been consummated.

Q. Do you so file this contract with Carbide & Carbon and the first 21 supplemental agreements as your Exhibit No. 1 to your deposition?

A. I do so with the exception I believe of No. 20 which was never executed. There is one gap in there somewhere.

Q. Do you mean that they skipped a number ! -

A. It was done deliberately because we had hoped to write another supplement that involved some technical change that the contractor wanted in connection with his operations and we have never gotten around to working that out, so it still remains as a gap. I believe it is No. 20.

Q. I notice that there is no supplemental agreement No.

15, Mr. Vanden Bulck.

A. It may be 15. I thought it was 20. There is one number in the sequence missing which was reserved for certain changes in the Scope of operation. It has never

been executed. .

Q. Now, going back to Roane-Anderson, have there been certain supplemental agreements or modifications executed in connection with the Roane-Anderson contract since modification No. 15, which is the last modification included in your Exhibit No. 1 in the Roane-Anderson cases?

[fol. 160] A. Yes, there have.

Q. I hand you mimeographed copies of modifications Nos. 16, 17, and 18 to Roane-Anderson contract, each of which is entitled "Supplemental Agreement", and ask you if those are accurate copies of such modifications 16 to 18 inclusive and if so, file those as Exhibit No. 2 in the Roane-Ander-

son cases?

A. Without personally checking these with the documents that I initialed, they appear to be in order. There are file eopies that go around for initialing which I personally initialed, and the original signed documents conform with those. As I say, I assume that these are copies.

Q. Will you have those compared for accuracy?

A. I will be glad to make that statement.

Q. And supplement your testiniony either by personal appearance if you complete the checking before we adjourn on these depositions, or by letter, which may be included in the record?

A. I will do that. 16, 17 and 18.

Mr. Fowler: Is that all right, Mr. Humphreys?

Mr. Humphreys: Yes.

Mr. Green: Explain the difference between modification and change order.

The Witness: A change order is issued under a change

provision of the contract which might change quantities of certain agreed-upon items to be increased or decreased depending upon the need, whereas a modification to the [fol. 161] contracts specifically requires the agreement between both parties to it and is added to the contract.

Q. Now, Mr. Vanden Bulck, in the two Roane-Anderson cases is it true that your Exhibit No. 1 and your Exhibit No. 2 include a full and accurate copy of the Roane-Anderson contract and all modifications and supplemental agreements up to this date, that is assuming you have checked Exhibit No. 2 for accuracy?

A Yes. We have a modification No. 19 in process at the moment which has not been signed by all parties as yet to the best of my knowledge. Mr. Horr can verify that later or

I can verify that and let you know about it. .

Q. In the Carbide and Carbon cases, Mr. Vanden Bulck, you have already filed as a part of your Exhibit No. 1 all supplemental agreements through No. 21. I hand you now supplemental agreements No. 22 and 23 and ask you if those are accurate copies of supplemental agreements to that contract which have been entered into since the date of the filing of the original bill?

A. I would like to have the same reservation with regard to these as with regard to Exhibit No. 2 to the Roams-An-

derson contract, Mr. Fowler.

Q. And you will make a similar indication as to whether they are accurate or not.

A. Yes.

Q. Will you file those two supplemental agreements Nos. [fol. 162] 22 and 23 as Exhibit No. 2 to your testimony in the two Carbon & Carbide cases subject to checking which you have indicated?

A. Correct

Q. In connection with the Carbide and Carbon contract and supplemental agreements, I notice that there are quite a number of places where words have been obliterated from the exhibits. In all other respects, subject to the checking that you have mentioned you will do on Exhibit No. 2, these two exhibits set forth fully and accurately the Carbide and Carbon contracts and supplemental agreements?

A. Yes.

Q. Now in the Roane-Anderson cases, Mr. Vanden Bulck, will call your attention to Article IX of the contract in

which it is provided in substance that title to all materials and so forth which the contractor purchases under the contract and for which the contractor shall be entitled to reimbursement, shall vest in the United States at such point or points as the Contracting Officer may designate in writing, subject to a right of final inspection. Can you teil me the origin in government practices of that provision and what it was intended to cover?

A. Yes, during the war when the War Department was engaged in tremendous expansion of industrial facilities for the production of war material, it often became necessary to place contract with contractors and manufacturers to process or manufacture equipment and material within the [fol. 163] limits of their particular field. I have in fhind there that you place an order with contractor "A" who does a certain amount of preliminary work on the material and is then directed by the Contracting Officer to ship to contractor "A" for further processing or additions of the specialties that he is particularly qualified to manufacture, and they may conceivably go to three or four different contractors before it finally winds up in the Government Facility where it is ultimately used, and the real purpose of that paragraph was to establish the title to the material in the Government at any point that the Contracting Officer should designate, so as to permit him to ship it on Government bills of lading, and to take advantage of land grant rates, and so forth.

Q. Have procurements by Roane-Anderson under this contract been of the kind which you have described?

A. No, their procurements were for direct delivery on the project.

Q. Is the same thing true of Carbide & Carbon contracts?

A. In some cases yes and some cases no. Where it has to do with processing equipment that falls under the peculiar conditions that I have enumerated here before it would have been necessary to ship it from one point to another before final installation in the plant.

Q. Has such shipping bon necessary under the Carbide & Carbon contract?

[fol. 164] A. I believe they maybe have had some of those, Mr. Fowler. I am not too sure that they have but

there have been certain changes in their plant facilities that

might have involved such shipments.

Q. Now, Mr. Vanden Bulck, would you please state whether under either contract, the Roane-Anderson or the Carbide & Carbon, that the contractor has ever designated in writing a point at which title passed to the United States Government?

A. Do you mean the Contracting Officer?

Q. Yes, the Contracting Officer.

A. To the best of my knowledge, no.

Q. Mr. Vanden Bulck, I want to ask you just a few questions about the actual method of handling procurements by both Roane-Anderson and Carbide & Carbon. What has been your understanding of the time at which title passes, and the facts affecting that. By title passing I mean title

passing to the United States Government.

A. In connection with a shipment which under the terms of the purchase they deliver f. o. b. the vendor or manufacturer's plant, it has always been my understanding that title passed at that point. To substantiate that, in a great number of cases, I believe in almost all of the cases the shipments were made on a Government bill of lading which was prepared by this office and forwarded on to the vendor or it was shipped on a commercial bill of lading with a nota-[fol. 165] tion on it to be converted to Government bill of lading at destination.

Q. You say title passed. Passed to whom?

A. To the Government.

Q. Are the materials or procurements in the possession of Roane-Anderson Company and Carbide & Carbon labeled

or branded in any way?

A. All property that permits its marking without injury is marked by either a stamp or brand or an attached label or a metal tag which indicates it is the property of the United States either by stating that it is the property of the United States, and it may be U. S. A. or United States Army or Atomic Energy Commission or some such initials.

Q. What exactly was the label used by Roane-Anderson Company in cases of procurement by Roane-Anderson Company, what lettering was on it?

A. I believe they used U.S. A.-R. A.

Q. When was that label attached to procurements?

A. As soon as the material was delivered at the receiving warehouse.

Q. Delivered by whom?

A. By the carrier or the vendor if he had his own delivery service.

Q. What is the meaning of that label U. S. A .- R. A. ?

A. The U. S. indicates the property, the title to it as being vested in the Government. The R. A. is merely for a [fol. 166] segregation of the property that is used by the various contractors on the area in the interest of carrying out their required functions under the contract. In other words, we have so many contractors on the area that there are items of property which are common to all of them that conceivably could be shuffled around so that the Government's interests are not protected to the greatest degree, and we identify Roane-Anderson property or rather that Government property in the control of Roane-Anderson Company by this R. A., simply as a part of the overall symbol.

Q. Do you know what label was used in the case of Car-

bide and Carbon acquisitions?

A. I believe it was U.S. A.—C&CCC, but I am not sure of that. I cannot definitely state that.

Q. What was the meaning of that label?"

A. It had the same meaning that was on the label placed on the property that was delivered to Roane-Anderson Company.

Q. When was the label attached to goods in the case of Carbide & Carbon?

A. They had their own receiving warehouse at the plant and it would be attached at the time the property was actually received.

Q. Received from the carrier or vendor?

A. Carrier or the vendor.

Q. Are the practices that you have described with respect [fol. 163] to receipt and label of goods prescribed by the

Atomic Energy Commission?

A. Yes, and that was as a result of a regulation that the War Department had in effect for all of the War Department property whether it was on a property or property on civil works of the War Department. The Property Manual prescribed that all property should have attached or placed

on it or be marked in such manner that it clearly indicates

it is property of the United States.

Q. Were the same practices adopted by the Atomic Energy Commission when it took over on January 1st, 1947?

A. Yes, the same rules and regulations that the Manhattan District project operated under were continued in effect

by the Atomic Energy Commission.

Q. If the Rocne-Anderson contract, for instance, should be cancelled, what becomes of the property in possession of Roane-Anderson here?

A. All of it is turned over to the Government.

Q. Is the same thing true of the Carbide & Carbon con-

A. Yes.

- Q. I will ask you, Mr. Vanden Bulck, since the Atomic Energy Act went into effect and since December 31, 1946, has the Atomic Energy Commission been engaged here in this Clinton Engineer area in the discharge of its duties and responsibilities under the Atomic Energy Act?

 [fol. 168] A. Yes.
- Q. Is that the whole purpose of the Commission's activities here?

A. Yes.

Mr. Fowler: It is agreed between counsel for the parties that Mr. Vanden Bulck's deposition shall be filed in both the two Roane-Anderson cases and the two Carbide & Carbon cases.

(The further taking of these depositions was adjourned until 9:30 a.m., December 14, 1948 when the further direct examination of Mr. Vanden Bulck was continued by Mr. Fowler.)

The Witness: I have checked the documents you have referred to yesterday and they are both correct.

Q. You are referring to both exhibits 2?

A. Both exhibits 2.

Q. Mr. Vanden Bulck, did the Clinton Engineer project and the work done there contribute to the construction of the atomic bomb that was used against Japan?

A. Yes, the Clinton Engineer project or the gaseous diffusion plant and the electro-magnetic separation plant

both separated material from basic uranium that was sub-

sequently used in the bomb.

Q. Is the operation of this project still of prime import-[fol. 169] ance in connection with military affairs of the United States?

A. Yes.

Q. The City of Oak Ridge is within the Clinton Engineer

A. That's correct.

Q. How large is the city now and what has been its

population since it was created?

A. The extent of the city in area is roughly six miles long and from a mile to a mile and a quarter in width, the long axis running east and west. At the peak, the population was in the neighborhood of 76,000. Since the gradual reduction in plant operation, which was effected as a res. of cutting out the less economical processing, it has reduced it to a population of about 36,000 at the moment.

Q. Can you tell us approximately how many miles of

roads lie within the whole area?

A. I believe it is around 156 or something like that. I remember reading that not so long ago, about 156 miles of road in the area.

Q. Does the City of Oak Ridge have a police organiza-

tion?

A. It has an organization which we call policemen who are on the payroll of the Roane-Anderson Company, but under the direct supervision of the AEC, with what police powers they get through the fact that these policemen are [fol. 170] deputy sheriffs of both Roane and Anderson Counties.

Q. I believe your estimony has indicated that the city has all of the usual municipal services, such as sewage disposal, electricity and water supply and so forth?

A. It does.

Q. To what extent, if any, do Roane and Anderson Counties contribute to the maintenance of this area, including Oak Ridge or any of the services such as police protection and all of the other usual municipal services that are maintained here for the benefit of the inhabitants and the people living here?

A. As far as the utilities are concerned or the maintenance of roads and streets, there is no contribution by the

county or state as to their upkeep. With regard to the Police Department, due to the arrangements we have made with the county officials involved, the sheriff's office, we apprehend persons who are violating a state law and then turn them over to the sheriff's office for jailing or necessary trial. That's the only service we get from the

Q. Can you tell us the annual appropriation of the Atomic Energy Commission for the maintenance of schools

within the area?

A. Yes, I believe that for the year 1949 that they established a figure somewhere in the neighborhood of \$2,400.00, for school maintenance. That includes the salaries of teachers and maintenance of the school buildings. Only [fol. 171] a part of that we pay to the County of Anderson for the payment of teachers' salaries, and the reason we have the contract with the County of Anderson for what we refer to as school operation, is to give recognition to the time that teachers spend on teaching programs in Oak Ridge for seniority and I believe for participation in the State Retirement Plan for Teachers.

Q. All of the money that maintains these schools is

supplied by the Atomic Energy Commission?

A. That's correct.

Cross-examination.

By Mr. Humphreys:

Q. As a matter of fact, those schools which are paid for by appropriation by the Atomic Energy Commission are operated as schools of the county in order that the pupils of the schools may attend accredited schools; that's correct isn't it?

A. That's correct.

Q. As a matter fact, although you put that in a collective sense to pay for the actual cost, they are operated as county schools in order that there may be proper credit given?

A. We made a contract with the county for the purpose of according the graduated student recognition that he

has attended an accredited school system.

Q. That's right. The money is paid over to the county and the money is distributed by the county for education, and contracts for teacher employment are handled through

[fol. 172] the County Board of Education, and the supervision of the schools is through the County Board of Edu-

tion. That's right, isn't it?

A. That's right. I might point out that the contract provides for a payment of the administrative cost of the county incurred in connection with its supervision of the schools, of around \$500.00 to \$600.00 a month. The Superintendent of the Schools at Oak Ridge is in effect selected by the Commission, and the county cooperatively places him on the payroll.

Q. But he is a county official?

A. That's right.

Q. And all of the teachers are county school teachers?

A. Yes.

Q. Recognized as such?

A. Yes.

Q. All prosecutions for law violations within the area are at the expense of the State Government, that is, the actual trial process?

A. Yes, we have no courts in the area. Therefore, it

must be handled by the State Government.

Q. With regard to the roads in this area at the time it was determined that lands in this particular vicinity would be acquired for the purpose of building this plant or these plants and carrying on this project, it is true that there were certain roads in this area that were suffi[fol. 173] cient to serve the area?

A. I believe so. There were roads through here. There were people living here and they had a means of ingress

and egress.

Q. When this territory was taken over and fenced off for secreey purposes, those roads were taken over by the—I suppose the Engineers, United States Army Engineers, and they were added to as became necessary?

A. The existing roads and all of the lands in the area that comprised the Clinton Engineer Works were taken

over by the Federal Government.

Q. But I mean the roads that were here were such as were sufficient to supply the needs and to accommodate the people?

A. That's right. I assume they were sufficient.

Q. And you have added to those roads as it has become necessary from time to time at your own expense?

A. Yes.

Q. As a metter of fact, because of the nature of your operations you have required many more roads than would ordinarily be required by a communit, of that

many people?/

A. I am not in a position to give you an authoritative statement on that but we have found it necessary because of having to isolate our plants to build direct roads of greater capacity than were in existence at the time when [fol. 174] we took over the area.

Q. So, in truth and fact, a large part of your road system is actually a part of your system of plant construction and plant location and plant maintenance?

A. That's right.

Q. Now, you are authorized under Section 9(b) of the Atomic Energy Act, and I read from that:

"In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes."

What payments, if any, are made to the state and local

governments in lieu of such property taxes?

A. Up to this time, none have been made with the exception of whatever construction you can place on the rental of bridges that we paid for that cross the Clinch River, the Edgemoor Bridge, and the Solway Bridge, on which we pay a tax or rental to the county.

Q. Now, with respect to the question of police protection and the payment of that initial cost, that is, in the employment of men to act as local peace officers or watchmen or guards or policemen, I believe that at one time the State of Tennessee undertook to have the area opened [fol. 175] to the Tennessee State Highway patrolmen in order that they might assist in policing the area. Is that true?

A. To the best of my knowledge that question is one that came up very recently when we made a public announcement of the Commission's intention to open up the City of Oak Ridge and remove it from the restricted status it is in now, and I believe that there were individuals from this office who went to the State Capital at Nashville and consulted with representatives from the Attorney General's

office and discussed that question.

Q. You don't recall that very shortly after this area was fenced off for security purposes that that question did come up, and that admission to the area was demanded, and that there were negotiations on that account between the State and representatives of the operators of this place, and that it was finally agreed that there would be no such insistence by the State?

A. I have no knowledge of that.

Q. Now, on yesterday you testified at some length with regard to the background and the inception of this plant, but I am not exactly clear how it is operated presently. The overall head of it is the Atomic Energy Commission. The Atomic Energy Commission, does it operate these plants, use its own personnel or does it use the United

States Army Engineers, or how is that? [fol. 176] A. No, the Atomic Energy Act provides for the appointment of five commissioners who shall be the head of the Atomic Energy Commission, one of whom is designated as a chairman. The Act also provides for the appointment of four directors, who have a specific responsibility under the language of the Act. It also provides for the appointment of a general manager who shall execute all of the orders of the Commission and carry on the general administration of the project. In turn, the general manager has re-delegated his authority to the Froduction Director, the Research Director, the Director of Engineering and the Director of Military Application. The Oak Ridge area, which comprises an operation at Clinton Engineer Works and also in the vicinity of Dayton, Ohio, is under the direct direction of the Director of Production. Mr. Franklin, who is the manager here, has been delegated the authority that he needs to supervise and oversee the area. The nature of the plant operation is such that the Government does not have on its staff or in its employ the technical means and qualifications to operate the plant. Each one of our production plants is operated by a contractor who has had considerable experience in the industrial operation of chemical separation plants, and that is the situation here today; whereby Carbide & Carbon operate the gaseous diffusion plant at K-25. They took over the operation of the electromagnetic

separation plant from Tennessee Eastman and are now operating it, and they took over the operation of the Oak Ridge National Laboratory from the Monsanto Chemical Company who had previously taken it over from the [fol. 177] University of Chicago.

Q. What plant is presently operated by Monsanto?

A. None.

Q. When did you say the operation of the experimental laboratory was taken over from Monsanto by Carbide & Carbon?

A. As of March 1st, this year.

Q. Actually, the contract between the Atomic Energy Commission and the prime contractors, except with regard to the operation of the experimental laboratory, those contracts are for the production of a known specific material in specific quantities, are they not?

A. That's right.

Q. And it is contemplated by those contracts that within the overall provisions of the contract, Carbon & Carbide will produce so much material of each type from each plant during the operating period, or does it have a production schedule?

- A. If you are familiar with the Atomic Energy Act, it requires that the President of the United States each year direct the Commission to produce so much material to produce so many weapons. Those production schedules come down through the channel of the Atomic Energy Commission to this area here and here they are then passed on to the contractor. But the language in the contract still indicates that he would do his best to produce [fol. 178] that material. He has never guaranteed that he would.
- Q. I don't believe that the Atomic Energy Commission and those whom it has appointed to attend to the actual supervision of its operation, not the contractors, they are not in position to produce any material themselves on account of lack of technical staff?

A. That's correct.

Q. So, actually, the methods employed by the contractor in producing the material, all of that is immediately and directly under the control of the contractor?

A. That is his -how-how for which we hired him, that's

right.

Q. In addition to the production of actual material, I

believe you say that there is an experimental laboratory that is maintained?

A. The Oak Ridge National Laboratory, I believe that is what you are referring to.

Q. Yes.

A. That's right.

Q. Do I understand that the purpose of that laboratory is the possible discovery of methods of application of the material being produced, or the discovery of more economical methods of producing that material, or what is the purpose of the maintenance of it?

A. It is primarily a research laboratory, that is, engaged in what we term basic research. There are two types that [fol. 179] industry recognizes, the basic which means delving into unknowns and sometimes it has reference to a specific purpose but not always certain of what you are going to get. The other is the type of research where we take a known discovered product and make application of it either in industry or other purposes.

Q What is the primary object of the operation of this experimental laboratory? Is it the application of this

material that has been made to various purposes?

A. I believe in actual practice it is about half and half.

Q. Now, Y-12 and K-25 plants have passed the experimental state and there are no purchases of supplies for materials at either of those plants for any other purpose than the production of the material contemplated by the contract. Would that general statement be true?

A. If you consider that there is always a certain amount of process improvement going on and research essential to that improvement being carried on in both of the plants.

Q. But the primary purpose of the operation of the plants and the purchase of supplies and materials is for the production of a set and agreed amount of material?

A. Yes.

Q. I believe you say that the methods to be used by the contractor in the production of those materials are such as the contractor within its experience and scientific knowls [fol. 180] edge determines to be best to achieve that end and that it controls those operations?

A. It has control of the operations in that it operates the plant on a day-to-day basis. Periodically, or whenever one of his research scientists come up with an idea which indicates that there is a possibility of process improvement,

then it is submitted to us. Invariably, that involves considerable investment by the Government and additional facilities and before they can go ahead and make such an addition to the existing plant they get our approval.

Q. But when that approval is granted, then the ordering and purchasing of supplies, that right and power is in the

contractor?

A. That all depends. Where, for instance, as at the present time, they have just completed negotiations with an architect-engineer for an addition to the plant, this will not be handled by the operating contractor. The reason for our keeping that separate is this: that as an operating contractor, he maintains a wage structure for industrial operation. There is a different rate struction for a construction job, and it would create management problems that he should not be confronted with by mixing the two within the same plant.

Q. But a contract of that character, your contract, contemplates the erection of a complete plant according to plans and specifications furnished, and that contractor has [fol. 181] the control of how he will build the plant except that he is required to meet a certain specified end when

his work is done?

A. The operating contractor is responsible for the process design. He has technical supervision and responsibility to see that the plant is constructed and meets his technical design requirement. As far as structure itself is concerned, he has no responsibility for it. He may go so far as to actually procure the actual equipment because of his technical know-how.

Q. So that actually the Atomic Commission does not reserve any control and does not exercise any control over the manner in which this contractor will purchase his specified and slotted material, except that control which exists by reason of the amount of money that they will give him with which

A. That was the facilities which were placed at his dis-

posal'in which to purchase material.

Q. Let me ask you this: In the operation of these plants through contractors has there been any other effort made except in this case to separate the cost of excise and privilege taxes from the cost of the article which is being bought for use by the Atomic Energy Commission or its contractors?

A Do you mean at any other location in the Commission's operations?

Q. Yes, and with regard to any other type of excise taxes

other than the Tennessee Retailer's Sales Tax?

A. I believe a similar situation exists in the State of New Mexico where a sales tax is also in effect and something of [fol. 182] that nature exists in the State of Washington with regard to the Business and Occupation Tax.

Q. But other than those two types of taxes, they are the only two types of excise taxes that the Atomic Energy Commission and the Government has undertaken to avoid

that you know of. Do you want to amplify that?

A. I believe that statement is still correct. I think it

exists. What the status of it is I don't know.

Q. What I am particularly driving at, Mr. Vanden Bulck, is this: Has the Atomic Energy Commission or the United States Government undertaken to cause the separation of the cost of other taxes from the sales price of any materials and supplies which it purchases in connection with the operation of its atomic plant? Has it undertaken to cause a separation of any other excise tax or privilege tax because that contributes to the sale price of those articles except with regard to this sales tax that you know of?

A. That's a difficult question. I can say this, that the General Accounting Office who reviews our expenditures here, has indicated to us an intense interest in the outcome of this litigation, because it is their contention that while we are discussing what we know here as the Sales Tax of the State of Tennessee in this case, Section IX(b) of the Atomic Energy Act, or whatever the section is that refers to exemption from taxes, has a much wider application than [fol. 153] does the sales tax, and just as soon as this case is settled, let's assume that it is settled in the Commission's favor, they will make an all-out effort to collect back all of the other taxes that have been paid as taxes.

Q. My question was this: that other than as regards this particular privilege tax, has the General Accounting Office ever required that you separate the cost of any other tax from the cost of any article purchased by the contractors 3

in the operation of these plants?

A. Where it is levied as a separate tax on that article, and it is distinguishable that way, the General Accounting Office has requested us not to pay the taxes or to pay it under protest.

0300

Q. You mean where there is a sales tax as such?

A. Yes.

Q. And that is the only form of privilege tax that the General Accounting Office has required the separation of from the cost price of the article purchased by the contractors at these plants here at Oak Ridge?

A. Yes.

Q. My recollection with respect to the Carbide contract is that the consideration for the work to be done is stricken out as secret material information that cannot be disclosed?

[fol. 184] A, I would have to see the contract to make certain of that but I believe that the general striking out of amounts had to do with the volume involved in the contract specifically. That was the intent, not to put the amount in, but as far as the fee to the contractor is concerned, that has to be in it because it is recorded in the hearings of the Appropriations Committee of the Congress as passed.

Q. What is the fee that is paid to Carbide & Carbon?

A. I can figure it out from the contract. I just don't know offhand. It may be somewhere between \$1,500,000 and \$1,900,000 a year, somewhere in there, maybe a little more. It would not be any less than that, I am sure. You can get that information from the record of the Appropriations hearings.

Q. Could you get the information and supply your depo-

sition with it?

A. Yes, I can do that.

Q. It would probably be more available to you?

A. I think I have a copy of it.

Q. In addition to being paid a fixed fee as you have indicated, is it or not true that Carbide & Carbon under the contract has the right to expect an interest in any patentable discoveries that are made under its operation? [fol. 185] A. I would have to refer to the patent article, but I believe it provides that all discoveries that it makes are and must be furnished to the Commission, and the Commission has the right to take out the exclusive patents or not as it sees fit, and it may in some cases indicate that it has no interest in the invention, at which time the contractor may if it so elects, take out a patent application.

Q. Reading from "Article VIII-R-Patent. / (a) It is

understood and agreed that whenever any patentable discovery or invention is made by the contractor or its employees in the course of the work called for in this contract, the Contracting Officer shall have the sole power to determine whether or not and where a patent application shall be filed, and to determine the disposition of the title to and the rights under any application or patent that may result. What is the purpose under that with regard to patents?

A We maintain at this installation a group known as the Patent Branch who review all of the notebooks of the scientists and technical experts that work for the contractors. The contractor also examines the operations and whenever he comes across something novel or that has patentable [fol. 186] possibilities, he submits that in the form of a notice to this group. They examine it and conduct the researches and come up with a recommendation as to whether or not the patent should be vested in the United States. During the war period very few patents were actually taken out by the United States, for the simple reason that patent information is public information and we did not want any thing in regard to the operation to get out as public. information. However, a number of them have been processed since and I believe that they have some arrangements with the Patent Office to keep them secret. Very few if any patent applications have been referred back to the contractor, indicating that we have no interest, and under the terms of the Act of course we cannot turn anything back that has to do with the application or production of fissionable material!

Q. On yesterday, Mr. Vanden Bulck, you explained the paragraph in each of the contracts relative to when title to materials, tools, machinery, equipment and supplies should be considered as vesting in the United States Government, and at that time, I believe, your explanation of that article was that it was a provision put in this contract primarily because a similar provision had been in other United States Government contracts, because it enabled the Government, by designating title at the proper time, to take advantage of special freight rates that were available to it, with cer[fol. 187] tain carriers. Was that correct?

A. That is correct. As I pointed out there were some procurements by a contractor of the Government involv-

ing processing through various manufacturing plants, not all of which were under the same contractor, and the material or the equipment had to be shipped from one point to the next, and the Government took complete responsibility for it. It had to do that in order to permit it to pay the contractor for the work it had completed in this chain.

Q. Now, that general statement in the contract in regard to when title shall vest in the Government is accompanied by certain provisos. Did your explanation of the matter undertake to extend to the provisos that are attached to

that general statement?

A. The proviso that I believe you refer to requires that the Contracting Officer designate the point at which title

passes; is that correct?"

Q. Yes, the first proviso is that the right of final inspection and acceptance or rejection of materials, machinery, equipment and supplies at such place or places as he may designate in writing, is referred to the Contracting Officer 1

A. That's right.

Q. How do you relate your explanation to that proviso?

A. In actual practice, the contractor places an order for equipment or supplies. They are delivered at Oak Ridge to these Government-owned warehouses that are assigned to the contractor for the execution of his work under the [fol. 188] contract.

Q. Let me interrupt you just a minute. Are they re-

ceived there by the employees of the contractor?

A. They are received there by the employees of the contractor.

Q. Let me ask you this further question?

Mr. Fowler: Did you finish your answer, Mr. Vanden

The Witness: I think I can add to this in just a moment.

Q. I am not going to get you off in your answer but at that point I wanted to ask you is there any inspection maintained by the Atomic Energy Commission at that point?

A. If I can go through the process, I think that will become clear.

Q. All right,

A. The material is received at the warehouse, and huge quantities of material come in. Because we hire a contractor for his technical know-how and management, we do not attempt to duplicate the force, and therefore 90 per

cent of the material that comes in has no check by a Government representative. Approximately 10 per cent of it is done selectively by spot check. He there examines the material with the contractor's inspector, and the two of them agree on the condition and he makes his report on that basis. Actually, we could not, without duplicating the contractor's entire force, engage in the inspection that the contract indicates.

[fol. 189] Q. So then the situation resolved itself down to this: If the contractor says he needs certain materials or supplies, he orders the materials and supplies, and they are delivered to him, and then he proceeds to use them in the manufacture of a certain designated amount of material under the contract?

A. That's right, with the exception of certain designated material which we must furnish him that he cannot obtain anywhere else. We attempt to have him buy everything he needs to operate the plant.

Q. An-except with regard to possibly, as you say, ten per cent, there is no check or inspection maintained by the Government or the Atomic Commission. He does all that himself.

A. He does all of that himself and we accept his operation on the basis of our ten per cent selective check.

Q. Now, this provision of the contract that you explained on yesterday contains another provise: "Provided further that upon final inspection the contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the contractor shall be responsible for the removal of the rejected property within a reasonable time."

Is that proviso complied with?

A. Wherever our selective check indicates that something should be returned, yes. But invariably it is a joint opinion reached by the two representatives, the contractor's [fol. 190] man and our man, that some material when it arrived is not in proper condition for use.

Q. As a matter of fact, the proviso, if it contemplates inspection, it actually is not complied with because inspection does not take place except with regard to a very small per cent of the material?

A. That's right. We just maintain a selective check.

Q. As a matter of fact, have you ever executed any writ-

A. Yes, we do in each instance. There is a receiving report which the inspector signs, even though he has not inspected all material, on the basis of the type of check that he conducts on a small portion of the material.

Q. He actually does sign such inspection statement al-

though he makes no inspection?

A. That's right.

Q. Now, on yesterday you made a statement with regard to your opinion as to title to the property, and while I did not object to it at the time, and reserved the right of objection on the trial, without waiving any right to make an objection, I would like to ask you in regard to that. Will you please state again what you said relative to your opinion as to when title to this property is vested in the United States Government?

A. In that connection, I have to refer to the various man-[fol. 191] uals that the Army, when it was operating this project, had as its guiding influence, which manuals have been accepted by the Atomic Energy Commission unfil it can substitute its own manuals. They are enormous technical manuals, and I believe that Mr. Fowler can get those for you, but they state generally that in any case, the property or the material that is purchased by the contractor will in effect be the property of the United States as soon as it is purchased, that the title vests in the Government upon delivery and is immediately marked and identified as Government property when it is delivered at the plants at which it is to be used; that for instance, to move on a Government bill of lading it must be Government property. which was the point I explained, that it vests at the f.o.b. point, which may be the manufacturer's plant. We could not ship private property on a Government bill of lading. It must be all Government property. We have had times in the past that we had to obtain special freight rates, what is known as Section 22 quotation. It is possible to obtain that freight rate only with regard to Government-owned material. The reason for getting the rate in that manner is to hide from the general public the nature of the item being transported. Normally, to get a freight rate established, you have to go through quite a bit of publicity and file with yarious divisions to give them all an opportunity to examine the reason for the rate structure. We have

time and again in the past gotten quotations, but because [fol. 192] the only way we could get the rate established was

to indicate that it was Government property.

Q. So then, your conclusion with regard to the time when title passed to the Government, I believe you say is actually based on statements contained in manuals that were gotten up by the U. S. Army Engineers at the time that operated the Oak Ridge plants and which manuals are still in effect now, having been adopted by the Atomic Energy Commission?

A. Yes.

Q. What are those manuals?

A. I don't know the numbers of them but the one having to do with property accountability, I believe, is known as TM 14-910. I believe that can be made available to you. What I mean is that those are the administrative regulations of the War Department which are passed on to us who are a part of it. It makes these statements. We have no other basis except to accept those at face value.

Q. You spoke of those regulations as regulations which were compiled by the United States Army Engineers to

govern cost-plus contracts; is that right?

A. Yes, the Audit Manual specifically had to do with that.

Q. Are these contracts between the Atomic Energy Commission and the prime contractors involved in these suits

such as could be fairly characterized as cost plus?

A. Yes, they are cost-plus-fixed-fee contracts entered into under the War Powers Act. That figure I gave you before [foi. 193] is \$1,920,000. That is where I estimated \$1,500,000.00 to \$1,800,000.00 as the fees paid for all of the operations at Oak Ridge.

Mr. Fowler: Paid Carbide & Carbon Chemical Corporation?

The Witness: Yes.

Q. Since these contractors are cost-plus-fixed-fee contractors, their relationship to the Atomic Energy Commission or to the Government is not essentially different from the relationship which any other cost-plus-fixed-fee contractor has to the United States Government; is that true or not?

A. That is not true. Actually, there is a different relationship in that we take a greater immediate interest in the expenditure of funds. In the normal Government method of contracting, which is either a lump sum or a unit price arrangement where we were interested in the finished product at so much per unit or so much for the entire amount, we buy a completed unit at the end of that time, and generally unless you get into a major job where you make partial payment, that title does not vest in the Government until the unit is turned over to you at completion. It is completely the contractor's responsibility.

Q. That same situation is true, isn't it, with regard to this material that is being manufactured by the prime contractors for the Atomic Energy Commission, that is, they turn out a completed amount of material under a contract [fol. 194] for which you pay them a fixed fee, and the manner in which they manufacture it is left to their own techni-

cal science and skill?

A. The fixed fee is merely a payment to the contractor to cover its know-how and management ability and so forth. In addition to the fixed fee they are reimbursed for their actual operating cost in running the plant. The contractor to give you a picture of how this operation works starts with a raw material at the in-put end of the plant, which we furnish to him, rather he cannot buy it. The basic material must be furnished by the Government. He then processes that through the plant and it comes out an end-product which he turns over to us.

Mr. Fowler: Who owns it during that progress?

The Witness: That's a legal question. I don't know whether I can answer that. But I would say we never lose control of it and since we furnished it initially I don't believe the title has ever passed.

Q. What you are speaking of it that material from one plant is delivered here and manufactured into—

A. No. Raw material from one of the other plants is delivered at the gaseous diffusion plant to go through the process and given to the Commission at the faucet at the other end of the plant. We then take it elsewhere where it again begins as raw material for processing into something else.

[fol. 195] Q. They get paid a certain amount for produc-

ing so many units of that material?

A. No, they get paid a fee for the operation of the plant whether they produce anything or not. I believe within the original contract it requires that a building or cell as we

refer to it, has to be out of operating and in complete shutdown for at least six months or more before their fee payment stops.

Q. Now, with regard to the operation of Roane-Anderson Company, Roane-Anderson Company is a private profit

corporation, isn't it?

A. It operates as such.

Q. Who incorporated it in Tennessee?

A. I believe the Turner Construction Company did ...

Q. Is it still a subsidiary of Turner Construction Company?

A. Yes.

Q. Who are the directors of it?

A. That I don't know. I would have to refer to one of these annual statements, but I am not familiar with the membership of the Board of Directors.

Q. And it operates the services which are spoken of in the contract for an operating fee which is mentioned in the

contract?

A. That's right.

Q. Now, in connection with this operation and those ser-[fol. 196] vices, what is the relationship between Roane-Anderson Company and your office as representative of the Atomic Energy Commission? To what extent do you undertake to control the operation of these services by Roane-Anderson Company?

A. Well, the contract provides for the type of services that they will perform in addition to which each year, before the end of the fiscal year they get together on a pro-

gram of their operations for the ensuing fiscal year.

Q. In the interim, after you have agreed on costs and other factors of that character, the operation of all of the facilities at Oak Ridge is peculiarly the business of Roane-Anderson Company and you are not concerned with it?

A. We do not enter into the operations. That is their

responsibility to operate.

Q. They buy all of the necessary supplies and materials and operate and you all pay the cost-plus-fixed-fee?

A. That's right, with the exception of a few minor items

which carry a statutory limitation as to prices.

Q. You do not exercise the same immediate interest and supervision over the execution of the Roane-Anderson contract that you do in regard to Carbide & Carbon and do in regard to Monsanto!

A. Strange as it may seem, we do exercise greater supervision with regard to Roane-Anderson than we do the [fol. 197] others, for the simple reason that town operation and that sort of maintenance operation is general knowledge to engineer personnel which comprises the Corps of Engineers from which the basic Erganization here is drawn. We know about that organization.

Q. You are more interested in the way they do it?

A. It had its public relation aspect in it.

Q. Would you refer to the contract, to any provision in the contract which reserves for the Commission any control over the manner in which Roane-Anderson Company shall discharge the functions that it contracts to discharge under the contract?

A. There are throughout the contract innumerable places where the prior approval of the Contracting Officer, who is an agent of the Commission, or his authorized representative, is required before the contractor does anything about it.

Q. What are those in regard to, if you recall? You are

more familiar with the contract than anybody else?

A. That the procurements in excess of a certain amount of money value have to be submitted for approval, changes and so forth.

Q. But that simply contemplates that if the cost of the operation exceeds an amount which it has been agreed upon should probably be sufficient, that they will have to get

approval to expend any more than that?

A. No, that is not true. It has no reference to the overall amount of the set-up. We might approve a program [fol. 198] for Roane-Anderson Company to spend a million and a half dollars through its own efforts in some maintenance project in town. Actually, the way the contract is written, in actual operation there is a provision there that if he places an order in excess—and I cannot remember the amount offhand—I believe it may be two thousand dollars—he must get the prior approval of the Contracting Officer or his authorized representative to place that purchase order despite the fact that he has gotten general approval of the overall project. There are a number of other actions that he takes that require prior approval of the Contracting Officer.

Q. Would you say in actual practice the reservations made in the contract in favor of the Atomic Energy Com-

A. Yes, because we have had to maintain an organization to undertake our responsibility in that regard.

Q. Now, on yesterday you referred to Rules and Regulations with reference to operations in one answer that you gave, and at that time those Rules and Regulations were not present, and I don't suppose they are this morning.

A. Can you remember exactly in what connection I men-

tioned it. I perhaps can produce it for you?

Q. I am not as clear on that as I should be. We were talking about the best evidence objection.

Mr. Fowler: The Administrative Audit Manual was one [fol. 199] thing.

Mr. Humphreys: There was another one.

The Witness: I think it was in connection with the marking of property.

Q. That's right.

A. That's "Technical Manual 14-910". I believe you have it there.

Redirect examination,

By Mr. Fowler:

Q. Mr. Vanden Bulck, in your testimony on cross-examination you summarized according to your best recollection the provisions of the Army's Manuals governing procurements which are being observed or have been observed at Oak Ridge. I will ask you in practice has the handling of purchased materials conformed to the summary as you stated it?

A. Yes, it was necessary that we comply with those Manuals because we were subject to inspection by a group that at the time the Army was in control of the project reported directly to the head of the project, General Groves, subject to the take-over by the Commission. Subject to the transfer of the activities to the Commission, that same group reported to the Comptroller of the Commission in exactly the same inspection capacity. The inspectors from this special branch went into each operation, checking the operating procedure, checking the receiving reports, checking the property records, made up an audit statement and certified the audit, wherein they either pointed out the

[fol. 200] operations for correction of gave a clean bill in the event we were complying with that Manual.

Q. Do I understand that that was the procedure employed here until the Atomic Energy Commission took over, and it

is still employed here today?

A. The only change that has been made is that the units have been de-centralized so that it now reports to the Fiscal Director at Oak Ridge instead of at the Washington level.

- Q. I hand you War Department Technical Manual TM 14-910 promulgated by the War Department over the signature of General Marshall, the then Chief of Staff, dated October 10, 1945, styled, "Changes. No. 1." I will ask you to look at paragraph 37 under Section IV and read that into the record.
- A. (Reading): "37. With respect to the receiving and inspection of materials and other property, it is unnecessary for the Contracting Officer to require Government employees designated by him to duplicate completely the quantity check and quality inspection performed by the contractor in connection with materials and other property received for use on a contract, provided:
- (a) Written evidence of quantity receipt, quality inspection and acceptance is obtained from the contractor in accordance with the provisions of paragraph 42. When the [fol. 201] contractor's quality inspection functions are not conducted simultaneously with the quantity check the contractor's routines should provide for advising the Accountable Property Officer of the results of such inspections when completed.

(b) The Contracting Officer satisfies himself that the contractor's technical methods of quality inspection are competent, that the contractor's procedures with respect to quantity receipt and physical and accounting control of such materials and property conform to good commercial practice and that all such methods and procedures are adequate to protect the interests of the Government.

(c) The Contracting Officer, by frequent observation, assures himself that such procedures and methods are being

effectively carried out."

That is the method under which we operate on this project.

Q. Both under the Manhattan District and the Atomic Energy Commission

A. Yes.

Q. Also, Mr. Vanden Bulck, I will ask you to read into the record paragraph 42 of Section V of this same document, the reason why I make this request being that paragraph 42 is referred to in paragraph 37.

[fol. 202] A. That's correct. (Reading):

"42. The Accountable Property Officer must obtain written acknowledgement of receipt of all Government property furnished to the contractor. The contractor's receiving report, shipping documents or other forms listing the property, as prescribed herein, may be used to obtain the contractor's acknowledgement of receipt and in all cases these documents must be signed by persons authorized by the contractor to receive and accept property on behalf of the contractor. A written statement listing the names of persons so authorized will be obtained from the contractor by the Accountable Property Officer, and he will review the documents to ascertain that they are appropriately receipted."

Q. Mr. Vanden Bulck, I notice on some of these reports that are used by Roane-Anderson Company and by Carbide & Carbon a reference to the Administrative Audit Manual and in connection with that I hand you a copy of paragraphs 202.1, .2, .3 of Chapter 2 of Part II of the Manual for Administrative Audit of cost-plus-a-fixed-fee construction contracts, and ask you if the provisions set forth in those paragraphs have been complied with by the Manhattan District and by the Atomic Energy Commission in procurements at Oak Ridge, particularly directing your attention to paragraph 202.3?

A. Yes, those are the regulations under which we operate [fol. 203] and confirm what I stated before, that on the basis of an examination of the contractor's procedure, and a selective test check by a Government representative, we accept the actual receipts by the contractors of those items which

are not physically checked by our representative.

Q. Is that paper which I have handed you an accurate copy of those paragraphs of the Administrative Audit Manual?

A. The only way that I could make that statement would be to actually compare it. I assume that whoever copied it

copied it correctly. It appears to be. I would not say

definitely that it is.

Q. Subject to your checking this for accuracy, and reporting back to us your conclusion as to its accuracy, will you file a copy of that as Exhibit No. 3 in the Roane-Anderson cases and Exhibit No. 2 a in the Carbide cases?

A. Yes. .

Q. Now, Mr. Vanden Bulck, I broke into General Humphreys' examination of you to ask you who owns the materials which are processed in the plants at Oak Ridge. Do you recall the provisions of the Atomic Energy Act with respect to fissionable materials and the raw materials

which may be manufactured into such?

A. If memory serves me right, I believe that Act states that title to all fissionable material is vested in the United States Government or the Commission and that small quantities may be allowed in the hands of private individuals [fol 204] under confidential regulations to be issued by the Commission.

Q. For instance, hospitals?

General Humphreys: Experimental purposes.

The Witness: I believe that you are talking about the publicity that has come out with regard to the use of radio-active material. The sort of material that generally is in the hands of hospitals for treatment of patients today is not fissionable material as such. This confirms what I stated before. I will read you from the Act here.

(Reading): "It shall be unlawful for any person, after sixty days from the effective date of this Act to

(A) possess or transfer any fissionable material, except as authorized by the Commission or

(B) export from or import into the United States any fissionable material or

(C) directly or indirectly engage in the production of any fissionable material outside of the United States."

I believe the Federal Register has published regulations on the manner in which source material may be placed in the bands of individuals other than the Commission, but it is in such quantities that it creates no hazard. Q. Who owns the material as it goes into the in-put part of the plants here?

[fol. 205] A. We have that shipped down from one of our other operations offices. It is shipped on Government bill of lading or Government truck or other Government carrier and delivered to the contractor. It is owned by us at the time it arrives here.

Q. Who owns it after it comes out of the output end?

A. We take absolute control of it and can arrange for its

shipment and delivery and so forth.

Q. With respect to the extent and control exercised by the Contracting Officer under these contracts, you have stated that in innumerable instances the contracts recite that supervision affirmation or action by the Contracting Officer is required. You are perfectly willing to let the contracts speak for themselves on that score, I take it?

A. Yes, I could not remember all of the cases where the

contract provides for such action.

Q. You illustrated your discussion of that subject by referring to a provision requiring the Contracting Officer's concurrence in procurement of more than two thousand dollars or twenty-five hundred dollars or some sum. In practice here at Oak Ridge has his concurrence been required in purchases in smaller sums than that?

A. No, in order to maintain our supervisory force to a minimum we have rigidly observed whatever limitations the contract contained and without any attempt to control the [fol. 206] contractor below those amounts. It would require additional personnel on our staff to take on a greater

volume.

Q. Has that been an unvarying practice not to approve any purchases below the amount specified in the contract?

A. Generally, yes. Occasionally, the contractor will come across a procurement which he has some doubt about as to whether he is going to receive reimbursement for it, at which time he requests our administrative review and concurrence that it is not required.

Q. General Humphreys asked you whether or not Roane-Anderson Company is strictly a privately-owned corporation operating for profit. Can you tell us the sole purpose

of the creation of Roane-Anderson Company?

A. Yes, I believe I went into that yesterday when I pointed out that the parent corporation, Turner Construc-

tion Company, as the name implies, is strictly a construction company and as such has to live with labor unions in the construction field, and pay a higher rate of wages than normally paid on an operation of this sort. In order that they would not disturb their relationship with construction unions we decided that it would be more advisable for them to organize a separate corporation just for this operation.

. Q. And Roane-Anderson Company was incorporated as

a result of that?

· A. I believe that's true.

[fol. 207] Q. So far as you know, does Roane-Anderson do anything else besides perform its contract here exhibited?

A. To the best of my knowledge, it does not do any other business except the operations in this area.

Q. From time to time in your testimony there has been a

reference to Government bills of lading.

General Humphreys, would you require that we exhibit

General Humphreys: No, I think everybody knows what · he is talking about.

Q. Have Government bills of lading been employed in connection with procurements by both Carbide & Carbon Chemical Converation and Roane-Anderson Company

A. In some instances, yes. I can cla-ify that by saying that it depends entirely on the terms of the purchase. They will send out requests for bids, and if the accepted bid provides for delivery F.O.B. the vendor or manufacturer's plant, it is either shipped on a Government bill of lading at that time, or it is shipped on a commercial bill of lading with a notation on it "conversion to Government bill of lading at destination."

Q. Can you tell us why in some instances that conversion notation is put on the bill of lading and in other instances

it is not?

A. Well, if it is not on there it means that the vendor or [fol. 208] manufacturer from whom the purchase was made has included the freight in his price, and it is not a separate item. In other words, we buy f.o.b. Oak Ridge and we do not consider freight except as a part of the purchase price. It is not considered separately.

Q. So, if any purchase is f.o.b. vendor's plant, the nota-

tion of conversion to Government bill of lading is uniformly put on the commercial bill of lading?

A. Yes, the contractor requests that the vendor or manu-

facturer put that statement on there-

Q. Now, various questions have been asked you about the inspection practices and you have described the selective or spot check inspection which has been made by the representatives of the Atomic Energy Commission and you have referred to the preparation of a receiving report signed by that representative. I now ask you, are those inspections and the receiving report concurrent with the receipt of the goods from the vendor?

A. When the material comes in and the package is broken open they provide a tally sheet. That tally sheet is the fore-runner of the actual inspection and receiving of the report which is the typed document. The man out there physically inspecting the property does not necessarily have available to him a typewriter that he can prepare such a report on, but he makes this tally-in sheet which has the same thing on it from the standpoint of signature that the final inspection and receiving report did.

[fol. 209] Q. In other words, the basic material that is incorporated in the receiving report is complete but written down on a tally-in sheet at the time of the receipt of the

goods!

A. That's right. That is the rough copy used by the inspector and checker.

Q. Is the inspection to which you refer made out when the package is broken open?

A. Yes.

Q. With reference to the questions asked you as to whether the resistance of the Atomic Energy Commission to state taxes is only applicable to the Tennessee Sales Tax, that is, so far as the Tennessee taxes are concerned, is that true, is the Tennessee Sales Tax the only tax of that state that the Atomic Energy Commission has resisted or will resist?

A. To the best of my knowledge, no. We will probably ask for consideration on some of the other taxes that are being paid that are intimately tied up with the activities of the Commission. What that will be I do not know, but for instance, at the moment we pay the carbonic tax. We could eliminate paying that tax by procuring the material directly

as a Government agency, but we find that economically that is unsound because we would then have to provide facilities for handling it, and on that basis we have paid the tax during the time the project was under the supervision of the [fol. 210] Army. However, the General Accounting Office has asked that question, that after the deriation on the Sales Tax, what is our proposal with regard to the Carbonic Gas Tax, and I believe that if we can get a determination as to the meaning of the language in the Act that perhaps there may be other taxes that will be the subject of requests for refund.

Q. With respect to another phase of your cross-examination, General Humphreys pointed out that Section IX of the Atomic Energy Act authorizes the Commission to make payments to state and local governments in lieu of property taxes. Now, I don't want to start an argument as to the end result, whether detrimental or beneficial to the tax revenues of the state resulting from the establishment of this project, but tell me this: Has the creation of this area and of this city resulted in substantial tax payments to the State of Tennessee by the private persons brought here, in the way of gasoline tax, privilege tax and sales tax under this same Act!

A. Yes, none of the actions of the Commission have been with a view toward obtaining exemption of the individual in this area who is here by reason of working on the project. In other words, every one of the stores and concessions aperated in town collect a sales tax, and I presume they return it to the state, and every one of the citizens living here paythat sales tax. We all purchase gasoline at local filling stations. The seven cents per gallon in that price is paid by [fol. 211] the people. No attempt is made to get an exemption. That is true of all of the taxes that are levied upon individuals in this area.

Q. They are not exempted simply by reason of any connection they may have with this particular project?

A. That's right. Carbide & Carbon operate cafeteria in the plant. As such we have been since the inception of the state sales tax collecting sales tax on the sales of various items, some over the counter and some on meals sold to employees and that tax is returned to the State each month, and there has been no question in regard to that.

Q. Mr. Vanden Bulck, you may or may not be familiar with the provision of the Tennessee Sales Tax Act that provides for part of the revenue being returned by the State to the various local governments, such as cities and counties. Have you heard of that?

A. I have read of that.

Q. Do you know whether or not the community or the City of Oak Ridge has received any such return of revenue from the state?

A. To the best of my knowledge, they have not received such a return.

Q. Do you know why that has been true?

A. I believe the purpose of the Sales Tax Act was to provide funds to increase the educational facilities in the state. We pay directly for the cost of our educational program. [fol. 212] in Oak Ridge, so, obviously, we are not returned anything for that purpose. Under the terms of the Sales Tax Act, certain surplus collections are distributed to the counties which are tied in, I believe, with the 1940 census which is the latest census of record, which keeps the distribution on the part of incorporated communities in the county within a certain population range. We are not incorporated in this area. We have no status here and our incorporated status cannot be considered in such distribution of such excess that might be returned to Anderson County.

Q. On the other hand, would you say that Roane County and Anderson County have benefited through the increase in

population at Oak Ridge!

A. I expect so. They have benefited, possibly not to the extent that we could benefit if we were an incorporated community, since whatever contribution Oak Ridge makes to the total sales tax picture is spread over the entire state, whereas, Oak Ridge would get a part of it if we had a recognized status.

Q. These operations at Oak Ridge have resulted in the unloosening of tremendous payrolls in this community and

in this state 1.

A. Yes.

Q. Speaking of the roads within the area before this project was established, what kind of country was this through here? Was it heavily populated? [fol. 213] A. No, to the best of my recollection, it was just

rolling farm land. The valleys were good for farm pur-

poses, but those were just grazing land. They had a number of regular country dirt roads with just one paved highway which we now class as the Turnpike coming through at Elza Gate and going out toward Oliver, Springs and the Robertsville section on toward Wheat and in that direction.

Q. Were any of those old roads adequate to handle the traffic demanded by the increase in population in the establishment of plants here?

A, No, they were entirely inadequate.

Q. To what extent did the Manhattan District and the Atomic Energy Commission build or rebuild roads within the area?

A. Well, we built Highway No. 61 from what was just a two-car road to where its a four-lane divided highway. We built the river road which runs down to the Edgemoor Bridge from what was just about one and one-half car width to two and in some cases, a three-dane highway. We have built all of these other roads that go through this area from mainly dirt roads or black top roads into substantial highways that could bear the heavy traffic that moves over them.

Q. Did you have to build all of the streets in Oak Ridge!

A. Yes.

Q. What did you do with that one payed road that led through this area?

[fol. 214] A. That is today. I believe, buried under our Turnpike here.

Q. Was your Turnpike much wider?

A. Yes, the other road was just a two-car road and this is four-car width with a dividing strip.

Q. In general, has it been necessary to rebuild all of the

roads and to build supplementary roads?

A. To the best of my knowledge, we built all of the reads that we needed in connection with our operation. There may be some little roads going back over the hills which were connections between farms located in this area, which by reason of their location we had no use for and did not need and therefore, they are abandoned today, I would say. I would like to make one general statement. I have made a lot of statements with regard to what goes on and how these things operate. I have been in position to do that because until June or August of this year I was directly responsible

for these operations. Organizationally, I was in position where the various units that conduct these things reported to me. Since that time I have not had any operating responsibility as such, and therefore, other people had to supervise or superintend those operations. Changes have been made in some of the details that I am not aware of since I no longer watch as I did the operation.

[fol. 215] Recross-examination.

By Mr. Humphreys:

Q. Do I understand that this statement is true since June?

A. Since about June or August of this year when we had a reorganization and I moved into the Special Staff position as Assistant to the Manager. Prior to that time, everything I said was to my knowledge.

Q. I believe you did explain that Oak Ridge is not an

A. That's right.

Q. It does not have a charter as a municipality from the State?

A. I Believe it does not have the official status as an

incorporated town.

Q. On the contrary, for security reasons it has grown up in an area that has been under fence and under intensive guard, and in order to even get in and out of it you have to go through certain security investigations as regards who you are and what your business is in the area; isn't that true!

A. To get in and out of the City of Oak Ridge requires only that somebody knows you and requests a pass. There is no investigation of the individual. The only check that is made is the check against a list of people who are barred from the area by reason of past association with the project or, for instance, we would nothinvite an international spy in here.

[fol. 216] Q. The truth of the matter is, it never has been actually a town or city except as you might apply that term to a large collection of buildings and people living in close proximity to each other?

*A. That's right. It came into existence primarily because we had to have an area such as this for the construction of

the plants. It had bertain natural advantages which caused this area to be selected because Knoxville or Clinton or Lake City or LaFollette were unable to absorb the numbers of people that they needed to operate the plants, and because there was not any other community here, this community was built.

(Later in the taking of these depositions, Mr. Vanden Bulck made the following statement):

I have examined Exhibit 3 in the Roane-Anderson cases, being Exhibit 2 a in the Carbide cases, and find it to be a correct and full copy of paragraphs 202.1 to 202.3 inclusive of Revision No. 16 of the Manual for Administrative Audits.

Further deponent saith not.

Charles Vanden Bulck, By ----, Court Reporter.

Sworn to before me this 13 December, 1948, Notary Public.

[fol. 217] Deposition of Ralph Callahan Filed July 1, 1949.

The next witness, RALPH CALLAHAN, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your full name, age, address and occupation.

A. Ralph Callahan, 48 years of age. My address is 111 Pomona Road, Oak Ridge, Tennessee. I am Comptroller of Roane-Anderson Company.

Q. How long have you been Comptroller of Roane-Anderson Company?

A. Since August 15, 1945.

Q. How long have you been located in Oak Ridge?

A. Since that same date, August 15, 1945.

Q. What are the duties of your position as Comptroller of Roane-Anderson Company?

A. To supervise the accounting and all financial matters of the company under the direct supervision of the Project Manager for Roane-Anderson Company.

Q. Who is Project Manager for Roane-Anderson Com-

pany?

A. L. C. Macneal.

Q. How long have you had first hand knowledge of the operation here at Oak Ridge?

A. I have had knowledge of the operations to a limited

extent since its inception.

Q. Were you a party to any of the conversations which took place at the time Roane-Anderson Company or the Turner Construction Company was invited to undertake this work here?

[fol. 218] A. I was not a party to them.

Q. Now, calling your attention to this contract No. W-7401-ENG-115, and ask you if Roane-Anderson Company undertook the discharge of the responsibility and work that were laid down by the contract?

A. They did.

Q. Can you give us a picture of the work that Roane-Anderson Company have carried on under this contract?

A. First, I might point out that everything that they have done has been under the direction originally of the United States Engineer Corps, and after the Atomic Energy Commission took over the work under the direction of the Commission. We have during the course of our stay in Oak Ridge operated all of the management of the housing facilities. At one time we operated the dormitories; at one time we operated cafeterias; at one time we operated the bus system. We now maintain the roads and streets, the utilities systems including the light, water and sewage disposal. We obtain concessionaires, business people who want to do business in Oak Ridge, who enter into a license or rental agreement with it subject to the approval of the Commission.

Q. In general, can it be said that Roane-Anderson Company performed all of the functions described in Article I of Section 2 of the contract where a lot of work is described by way of illustration, but not of limitation?

A. At one time or the other in the course of our work here

we have done those items.

[fol. 219] Q. Have you done considerable work with

respect to the construction or maintenance of highways and streets?

A. We have done in the actual construction of streets or highways, but we have practically the sole responsibility for the maintenance of those streets and highways.

Q. Now, referring particularly to Article I, paragraph 1 of the contract, and I notice that the original contract is dated February 14, 1944, that it says in part in Article I, paragraph 1:

"The contractor shall operate and maintain all Government owned facilities, utilities, services, properties and appurtenances situated within the Chinton Engineer Works area in the State of Tennessee, as directed by the Contracting Officer."

I also notice that Modification No. 14 of this contract in Article I, paragraph 1 reads in part:

"The contractor shall manage, operate and/or maintain facilities, utilities, roads, services, properties and appurtenances situated within and/or outside the Clinton Engineer Works in the State of Tennessee, including, but not limited to, Government-owned facilities, utilities, roads, services, properties and appurtenances, as directed or authorized by the Contracting Officer."

You will notice, Mr. Callahan, that the original contract provided for Roane-Anderson Company operation of Government-owned utilities, whereas Modification No. 14 provides for operation not limited to Government-owned facilities. I ask you, has Roane-Anderson Company managed, [fol. 220] operated or maintained any facilities, utilities, roads and so forth that are not Government-owned?

A. Yes.

Q. To what extent?

A. To a limited extent only.

Q. Can you illustrate your reply?

A. There are a number of roads leading from highways or into major highways into the project that we maintain. For instance, there is a road from the Edgemoor Gate that has its terminus in Clinton Pike, I believe that is what it is called, that we maintain. That road is not, as I understand it, Government property. There are other roads,

some leading from the K-25 area over on the highways there in that section that we maintain.

Q. Is the maintenance of these roads not owned by the Government considered essential in the operation of the

Clinton Engineer Works?

A. I presume that it is. We do such work as agent of the Government under its direction and it is not for us to inquire as to the necessity or the lack of necessity.

Q. Would you say that all facilities, roads and so forth that you have managed or operated which are not owned by the United States Government, have been maintained or operated by you strictly as an incident to the operation of the Clinton Engineer Works as a whole?

A. That is correct.

Q. Would you say also that the amount of work performed by Roane-Anderson Company or non-Government-owned facilities or properties is small or large in comfol 221] parison with the amount of work done by Roane-Anderson Company with respect to Government-owned property?

A. The proportion of work done on properties not owned by the Government is extremely small; in fact, it is almost negligible in comparison with the work that is

done on Government-owned properties.

Q. Has Roane-Anderson Company any business at all except the performance of its contract exhibited in this record?

A. It has no other business.

Q. Has Roane-Anderson used or had in its care, custody or possession any property that it did not regard as being Government-owned except the roads of the character you have described or other equally negligible items?

A. We have none. Insofar as I know, the only property that is owned by Roane-Anderson Company of a tangible nature is one automobile. Of an intangible nature, we, have a small amount of money.

Q. Now, Mr. Callahan with regard to Article I, section

3 of the contract where it is provided:

"In the operation of the facilities under this contract and in the procurement of any and all supplies, materials, equipment necessary to the performance of the work hereunder, the contractor shall act as agent for the United States of America". That is the first part of that paragraph. I will ask you, has the Roane-Anderson Company ever regarded itself as acting otherwise than as agent for the United [fol. 222] States in obtaining procurements?

A. It has not. In fact, we understood from the inception of our contract that we were to do no work or to take no action other than as agent of the United States of America.

Q. You may or may not be able to answer the next question, Mr. Callahan, but I call your attention to the reverse side of the purchase order form that Roane-Anderson Company used until recently, paragraph 3 under "Instructions, Terms, and Conditions" where it says: "This order does not bind or purport to bind the United States Government, its officers or agents." Do you know the source of that provision which appeared on the reverse side of that purchase order?

A. It is my understanding that when we came onto the area to commence work that we had no forms, and it was accordingly necessary for us to get forms and books of account set up, and in setting up our purchase order forms we used an old Stone & Webster form, and copied it, as far as I have been able to ascertain verbatim, probably without too much thought as to the contents of the wording, but presumably the thought was that if it was good enough for Stone and Webster it was good enough for us. In other words, we had to get something.

Q. Was that borrowing of phraseology somewhat typical of the compiling of contracts back in those days?

A. It was.

Q. Now, can you give us an idea as to the various kinds of motors, tools, equipment and so forth that Roane-Anderson Company buys in discharging this contract? [fol. 223] A. It would be almost impossible, it would be impossible, to name every one because in the maintenance of the roads and streets it is necessary for us to buy road materials, in the maintenance of houses it is necessary for us to buy all types of plumbing, electric fixtures, wiring, lumber, and various types of composition boards. In other words, to answer the question with respect to housing would necessitate enumerating every item that went into a house. When we operated the cafeterias it was necessary to buy food. At the present time, we are buying food for the hospital, which is a limited operation and function of Roane-Anderson Company. We buy sup-

plies of all types. About the best answer I think I can give to the question as to what we buy is that we buy practically every type of material that would be necessary for the operation of this town in the performance of our contract, automobile supplies, parts, lumber, stone, and so forth.

Q. Mr. Callahan, I believe that one of the Roane-Anderson Company officials remarked to me at one time in reply to the same question I asked you, said "name anything, and we buy it."

A. That's just about correct. I asked one of our men the other day if he had bought any elephant's toes, and

he said no.

Q. Of course, you have not bought any fissionable material either?

A. No.

Q. Have all of the things which you have bought been used in the performance of this contract exhibited here?

A. To that which we have bought as agent of the United States of America, the answer is yes. Recently, we bought a used car, and that is the only purchase that I know of [fol. 224] that has been made by Roane-Anderson Company in its private capacity.

Q. Now, Mr. Callahan, you said a few moments ago that there was some of the money of Roane-Anderson Company on loan to the Government in this project. Can you tell me how much money of Roane-Anderson Company was on loan to the Government for use in this project on June 1st, 1947, which was the date the Tennessee Sales Act went into effect?

A. I can but I will have to refer to a statement here. As of the close of business May 31st, 1947 this company had \$105,407.19; that was on loan to the United States

Government.

Q. How much money was in the project originally that had come from the United States Government itself?

A. Actually on hand was \$234,526.59.

Q. Has there been any variation in those items since

June 1st, 1947 either up or down?

A. Yes. From that date up to the present, the trend thas been downward until as of the moment, as of July 1st, 1948 we had no money employed in the operation of this contract.

Q. Have the costs of purchases since June 1st, 1947 been paid out of the funds as you have described them?

A. They have.

Q. Is there a Modification to the Contract now in process of being prepared which will relieve Roane-Anderson Company of any obligation to loan its own funds to the project?

A. There is. In fact, we have signed such a modification.

Q. Has it gone into effect?

[fel. 225] A. It has gone into effect to the extent that the Government has advanced funds to us as of October 1st, 1948. It is my understanding the Modification will be signed by the Commission very shortly.

Q. What provision does that Modification make with respect to putting Roane-Anderson Company in funds for

the carrying on of this operation?

A. The Modification contemplates that there would be two sources of Government money made available. One would be from the revenue collected from the operation of the Government-owned facilities. The other would be a direct advance of Government funds, and in order to ascertain the amount of such advance an estimate is made of our net operating cash requirements for a given period and the money is advanced accordingly.

Q. Are those advancements to be made at regular inter-

vals?

A. Monthly.

Q. Does Roane-Anderson Company take out insurance on

procurements which it purchases?

A. I might answer that question directly there. Roane-Anderson Company itself takes out no insurance. As agent of the United States Government, it does not take out any insurance on procurements, so there is no insurance.

Q. Do you know why no insurance is effected by it as

agent?

A. Our contract requires that we procure only such insurance as may be approved by the Contracting Officer. No such insurance has been approved.

Q. Do you know as matter of fact whether the United [fol. 226] States Government has a practice of insuring its property?

A. It is my understanding that it is its own insurer.

Q. Is there anything further that you care to say about

the agency status of Roane-Anderson Company under this contract?

A. Other than to say that from the very inception of this work, both in our New York office-and incidentally, I was in the New York office of Turner Construction Company in 1943 when this contract was negotiated—as I mentioned before, I had no direct contract with the Army of the United States in the hegotiations of this contract. For that reason, all of the data which I might have or might know in the nature of conversations would be purely second-hand, but I do know this, that the instructions given by the officials of the company to us was that we were to act as agent of the United States of America, and that fact was impressed upon us. When we came into Oak Ridge, we found that that was not only the intention of our company, but was from time to time and even is today strongly brought to our attention, first by the Army and second by the Atomic Energy Commission. So there has always been a definite understanding that we were acting as agent of the United States of America. All contracts that we write for the renting of houses, for business concessions, sub-contracting and every type of purchase and every type of operation it is very clearly and definitely stated that we are acting as agent of the United States of America, and in some of our contracts as a precautionary measure it is particularly, [fol. 227] provided that we assume no liability in a private or corporate capacity, and that in making the contract we do so absolutely as agent of the United States Government.

Cross-examination.

By Mr. Humphreys:

Without waiving the right to interpose at the hearing objections to the conclusions reached by the witness as to the legal status of Roane-Anderson Company with the Atomic Energy Commission as agent of that Commission, I will undertake to ask him a few questions on cross-examination.

Q. What facilities have been operated by Roane-Ander-

son Company since June 1st, 1947 in Tennessee?

A. To answer that question in the proper way at the outset, Roane Anderson Company has not operated or performed any work in the State of Tennessee other than that called for under this contract that we have been discussing.

With respect to the work performed by it as agent of the United States Government, under that contract we have maintained the roads and streets in Oak Ridge. We have operated the utilities, that is, we have maintained the distribution lines within the area, the water and sewage treatment plants, we have entered into agreements as agent with various businesses whom we refer to as concessionaires, we have subcontracted certain phases of our operation such as delivery of coal or garbage removal service; we have also maintained all of the Government buildings here: that is, by Government buildings, I mean buildings such as the [fol. 228] Administration Buildings occupied by the Commission, the public buildings made available to the public, such as the Recreation Halls where those Halls have been made available for public use and not operated as a private business. Up until November 15th, we operated five moving-picture shows here. We have maintained and managed the housing facilities involving the maintenance of the premises and the collection of rents, or occupancy compensation. To the extent provided by our contract, we have paid the salaries of the firemen and the policemen. We refer to such employees as mandatory employees for the reason that they are placed upon our payroll by direction of the Commission. Their work is supervised solely by the Commission, and we have neither the right to hire or fire them. Our sole work with respect to such employees is to pay them upon certification of the amount due by the Commission. Right at the moment I cannot think of anythingelse, but that is typical. . In addition to that, I might mention that from time to time the Commission has directed us to do work of a special nature. We have maintained automotive equipment that is assigned to the company for Suse in the motor pool, and b- the motor pool, I mean the Government-owned cars that are used, say, for contract purposes. Carbide & Carbon has its own pool. Roane-Anderson has an allotment of cars assigned to it.

Q. How many of the services that have been operated by Roane Anderson Company since June 1st, 1947 are services for which charge was made to the persons to whom the service was delivered under the contract? [fol. 229] A. The management and maintenance of hous-

ing of course results in revenue in the form of money paid by the tenants.

Q. That money is collected by Roane-Anderson Company?

A. That money is collected by Roane-Anderson Company but is turned over to the Government. I might point out here that revenues made in operation are credited to the United States Government, and we take no part of those as such inasmuch as we are paid a fixed fee payable monthly.

Mr. Fowler: Had you finished your answer about other revenue-producing activities?

Mr. Humphreys: No, he has not.

The Witness: No. The letting of space to businesses has resulted in revenue. We have made a few sales of materials to contractors but in those case. I want to point out that we have collected the sales tax on such materials and they paid it.

Q. Are there other revenue-producing services operated in addition?

A. The hospital has been a revenue-producing source. I might explain in reference to the hospital that that is what we call a semi-mandatory operation. There again, the nurses, physicians and certain of the hospital medical staff are mandatory employees, and our responsibility in the hospital has been confined largely to procurement of hospital supplies, paying the payrolls and collecting the money received from patients. That money in turn is also classed by us as Government revenue.

Q. Would it be possible for you to give some reasonably [fol. 230] accurate estimate of what per cent of your purchases of material and supplies are for revenue-producing

services operated?

A. The only way that I could do that would be just to determine the amount returned for sales tax. I will say this, that it is an extremely small proportion, almost accligible, because we are not in the business of selling materials. It is only where such sales are made which would be a small part of the operation. Incidentally, there is one thing I did not mention.

Q. Excuse me, but I did not make myself clear to you. What I was asking you about is what proportion of your purchase of materials and supplies are for the revenue-producing services that you operate: what proportion of your services?

A. I don't knew, because unless we were to trace that

all through, I could not tell. For instance, we buy lumber. That lumber may be used in a house which results in revenue. It may be used to repair or build a room on a Government building, which is not revenue-producing. It is quite possible if I were to go back to records we might be able to work out something but off-hand, I could not tell you what part actually results in revenue and what part results in maintenance, or capital cost to the Government.

Q. You spoke on your direct examination of other non-Government-owned facilities other than roads which you mentioned that are maintained by Roane-Anderson Com-

pany. What are those?

[fel. 231] A. Would you state your question again, please?

Q. I say, on direct examination as I understood it, you stated that under Article I of the amended contract with the Atomic Energy Commission Roane-Anderson Company was required to maintain facilities that were not Government-owned, and you mentioned in that connection that Roane-Anderson Company had maintained certain roads that led into the area on the assumption that it was desirable, being directed to do so by the Government and I wanted to ask you if there are other non-Government-owned facilities that you all do any work on, or maintain?

A. Insofar as I know of, there are none other. I don't think we do any work at all on the Tennessee Valley Authority lines that come through here, but even if we did something on TVA lines within the area that would still probably be classed as Government-owned, but we do not do anything for private individuals or private companies

in that sense.

Q. Then, other than the work that is done on these roads and streets, there are not any non-Government-owned facilities that you do any work on?

A. That's right.

Mr. Humphreys: That's what I want to get pinned down.

And further deponent saith not.

Ralph Callahan, by ----, Court Reporter.

[fol. 232] Deposition of Walter H. Leedom Filed July 1, 1949

The next witness, WALTER H. LEEDOM, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. Mr. Leedom, state your full name, age, address and occupation.

A. Age is sixty, my address is 108 Everett Circle, Oak Ridge. I am Chief Purchasing Agent for Roane-Anderson Company.

Q. How long have you been Purchasing Agent for Roane-Anderson Company?

A. Since the beginning of the operation in October, 1943.

Q. Have you been at Oak Ridge since that time?

A. I have been here continuously since, in that position.

Q. Will you state your duties as Purchasing Agent?

A. My duties are to administer the Purchasing Department and its personnel, to examine and sign purchase orders and other administrative details in reference to the purchasing of supplies and the purchase orders in reference to the purchasing of material.

Q. In carrying out this contract with the United States Government filed as Exhibits 1° and 2 in this case has the Roane-Anderson Company engaged in an extensive pro-

curement program!

[fol., 233] A. I should say very extensive and continuous.

Q. Has Roane-Anderson Company developed a standard

procedure for the buying of materials?

A. That has been developed by arrangements with the Army and later the Atomic Energy Commission and of course the representatives of the General Accounting Office are stationed here.

Q. Have you a more or less standard set of forms that are used in purchases?

A. Yes.

100 TO 1

Q. In this connection, Mr. Leedom, I hand you Purchase Requisition No. B 280 which has been filed as an exhibit to the original bill in this case, being page 1 of Exhibit B to the original bill. Is that a photostatic copy of an original purchase requisition of Roane-Anderson Company?

A. Yes, it is a photostal of the original requisition of a mandatory employee of Roane-Anderson Company. I mean by that Hackworth was.

Q. And he was connected with the Police Department?

A. With the Police Department which is a mandatory.

activity of Roane-Anderson Company.

Q. Has this form of Purchase Requisition been in use since Roane-Anderson Company started functioning here at Oak Ridge.

A. Yes, it has,

• Q. Will you file this Purchase Requisition B-280 as Exhibit 4 to the Complainants' testimony?

A. I do so.

COMPLAINANTS' EXHIBIT #4

Walter H. Leedom

[fol. 284] Q. With whom do these requisitions originate?

A. They originate for the most part in the Division of Warehousing, that is for the purchases for stock. They originate to some extent in other locations of the Roane-Anderson Company operations and in the mandatory facilities, Police Department, Fire Department and Hospital.

Q. Do any such requisitions originate with the Atomic

Energy Commission or its employees?

A. Not on this form. That is, the original demand for purchase might originate with the Atomic Energy Commission. So far as my activity is concerned they invariably originate with the Central Warehousing or other authorized individual for the preparation of a Purchase Requisition which is this form.

Q. This particular Purchase Requisition may be described as typical; is that correct!

A. Typical.

Q. Is any change in this Purchase Requisition form contemplated?

A. No change other than slight rearrangement of the spacing. Nothing involving any change in the nature of it or the effect of it.

Q. No, next, Mr. Leedom, I will ask you to turn to what has been filed as page 2 of Exhibit B to the original bill, being a photostatic copy of a Purchase Order and I will

ask you if that Purchase Order there is typical of purchase orders of Roane Anderson Company?

As Yes, it is.

[fol. 235] Q. That is No. 40198, I believe?

A. That's correct.

Q. Will you file that photostatic copy as Exhibit 5 to Com-

A. I so file it.

COMPLAINANTS' EXHIBIT 5

Q. Now, I hand you, Mr. Leedom, a paper which purports to be a photostatic copy of the original of which Exhibit 5 is the fifth copy. Would you tell me if that is true?

A. That is true.

Q. I will ask you to file the paper which I have just handed you, being the original or first copy of Purchase Order No. 40198 as Exhibit No. 6 to Complainants' testimony.

COMPLAINANTS' EXHIBIT 6

A. I so file it. The interlineations, by the way, were made in the office of the concern receiving the order and are not a part of the original as mailed by us.

Q. And by interlineations just what do you refer to?

A. The circle around "Shipping directions," the cross marks across "Federal Excise Taxes", the notation under it, the struckout words in the description of two items and the part that follows the description of the second item. In fact, all of the longhand notations on the order are additional to it after it was mailed by us.

Q. How many copies are made of purchase orders?

A. Normally 17 including the original.

Q. Do the copies all correspond exactly with the original?

A. Not exactly.

Q. What are the differences?

A. The copies do not all have the conditions printed on the back of the original. The copies do not have this [fol. 236] notation in the lower lefthand corner, reading: "The material and/or equipment...", and so forth.

Q. How many copies conform exactly to the original?

A. No copy conforms exactly to the original. This notation in the lower lefthand corner appeared only on the original.

Q. Can you give us some idea of what becomes of the original and the various copies?

A. Roughly, the original of course is mailed to the supplier after it has been signed and released and if necessary after it has been approved. That is, the cases where approval is required by procedure. Along with the original is mailed the No. 2 copy which is known as the Acceptance Copy and on which the supplier makes notation of the fact and date of acceptance of the order with his signature.

Q. And mails that one back!

A. And returns that to us for the record. The receipt of the signed acceptance copy causes the purchase order to become a contract. The No. 3 copy is no longer used. The No. 4 copy is placed on file for the immediate use of the General Accounting Office whose representatives refer to it if they have any question regarding it. The No. 5 copy is no longer used. The No. 6 copy is a copy that serves for the purpose of receiving the approving signature of the representative of the Contracting Officer, and is used where his approval is required. The No. 7 copy is for internal use in the Accounting Department of Roane-Anderson Company. I would like to correct that. It is the [fol. 237] copy that is used with reference to submission of the Public Voucher Form No. 1034 to claim reimburse-The No. 8 copy is the internal copy used by the Accounting Division of the Roane-Anderson Company for reference purposes. It is their work copy. 9 copy goes to the Property Department of Roane-Ander !son Company in order that they may have a record in the Property Account of any article purchased or otherwise disposed of in the Property records. The No. 10 copy is the Warehouse copy, that is, Roane-Anderson Company's Warehouse copy. No. 11 is the Receiving Department copy for use in identifying incoming shipments. No. 12 copy is the copy sent to the individual in the field who is furthest removed from the purchase and for his infor-That is an information copy for the man in the field. The 13th copy is filed in the Purchasing Department in a numerical file for the purpose of locating an order by number. The 14th copy is the Purchasing Department's file copy to which all purchase papers are attached. It is the complete record file of the purchase. The No. 15 copy

goes to the Expediting Department for their use. No. 16 is retained in the office of the supplier.

Q. With respect to copy No. 11 which I believe you say

goes to the Receiving Clerk-

A. I said the Receiving Department. This is a section of the Central Warehousing that performs the receiving function.

Q. When is the copy sent to the Receiving Department? A. That is sent out at the same time the original order [fol. 238] is released. In fact, all copies are distributed at the time the original is placed in the mail.

· Q. The Receiving Department would have this 11th copy

at the time the goods arrived?

A. They had it before the goods arrived unless it is a confirmation of something that had happened. I mean, confirmation of a telephone order, all of which are confirmed in writing. There is no exception to that.

Q. Turning to the original of this purchase order which you have filed as Exhibit No. 6, I want to call your attention to certain particular provisions appearing on it. In the middle of the page towards the top we find the following language:

"Prices are f. o. b. destination unless otherwise specified."

Can you tell me, is there any standard handling as to where the prices f. o. b., whether it is at destination or at

the point of shipment?

A. That is as agreed. The purpose of this notation is to provide for that particular phase and the indication of price, since no price is complete without indication of the point of delivery. It is placed there for the purpose of simplifying the preparation of the order, since if it does not apply, it is necessary to type in the price notation that indicates the exception.

Q. Immediately following that is the notation "Transportation Charges must be Prepaid." Does that statement apply in every purchase?

[fol. 239] A. That is not enforced. It is merely to encourage the prepayment of transportation charges where they are to be borne by the supplier. If they are not prepaid, we pay them.

Q. And transactions are handled both ways, that is, sometimes prepaid and sometimes not?

A. Yes.

Q. Going back to your description of the copies, Mr. Leedom, you said that copies 3 and 5 are no longer used and you will notice that we filed as Exhibit 5 to this testimony copy No. 5 of the particular purchase order that we are talking about here. How long was copy No. 5 used

and how does it happen to be discontinued?

A Copies 3 and 5 were required by the Army who kept files of the signed acceptance copies and No. 3 being provided the Army as a copy of the acceptance signature, and the No. 5 was a copy of the order that had received the signature of the Approving Officer, that is, of the authorized representative who approved the No. 6 copy for Roane-Anderson Company. That was discontinued by the Atomic Energy Commission as no longer necessary.

Q. Despite the fact that No. 5 has been discontinued, yet this Exhibit 5 here, which is copy No. 5 exhibits a typical

purchase order so far as copies are concerned?

A. That's correct.

Q. What kind of carriers, what methods of transportation

are used to get procurements to Oak Ridge?

A. Well, we used all conventional methods. Rail freight, motor freight, railway express, parcel post, air mail or [fol. 240] express, first class mail and in some cases by messenger.

Q. Where is the receiving point of Roane-Anderson Com-

pany?

A. The receiving point is one of the warehouses, at present Warehouse C-1; one of the warehouses in Cak Ridge.

Q. Further directing your attention to the original Purchase Order Exhibit 6, you will notice a notation in the upper right side: "Ship to: The District Engineer, Clinton Engineer Works, c/of Roane-Anderson Company." Has

that direction always been given to sellers!

A. That has been given in every case. There has never been any exception to that. I am speaking of under Army operations. The words, "Ship to United States Atomic Energy Commission," instead of to the District Engineer and so forth were substituted when the form was adapted to the Atomic Energy Commission operation.

Q. Was the District Engineer an officer or employee of

the United States?

A. He was an Army Officer.

Q. And since the Atomic Energy Commission has taken ever you say that the direction has been to ship to U.S. A.E.C.?

A. To the U.S. Atomic Energy Commission in care of

Roane-Anderson Company.

Q. And all purchase orders carry that direction?

A. They do.

Q. Now, on the right hand side below the box that we have just been speaking of, you will find the statement: "State and local and use taxes are not applicable to this purchase, which is for the use of the United States and such taxes should not be included in your invoice." Now, on the lower lefthand side contrasting with the language just [fol. 241] quoted, there is a statement also reading as follows:

"Note: Notwithstanding the printed notation to the contrary until otherwise advised by U. S. we will pay the State of Tennessee two per cent sales (or use) tax on this purchase."

Can you tell why that stamp notation was put on there and under whose direction?

A. That was added to the order in connection with the effectiveness of the State of Tennessee Sales and Use Tax Law by direction of the Contracting Officer.

Q. Did you understand it was put on there as an incident

to negotiations with the State of Tennessee?

A. Unquestionably. That is why the printed notation was not changed. The use of the rubber stamp was considered temporary.

Q. Now, below the stamp notation of which we have just spoken and in the lower lefthand corner the following

appears:

"The material and/or equipment to be supplied against this order is for the account of the United States Government and becomes property of the Government at the time it is shipped."

As I understand your testimony, that statement just quoted appeared only on the original of the purchase order?

A. That's correct.

Q. And that was the copy that went to the supplier?

A. To the supplier.

Q. Was that statement I have just read carried on purchase orders, all purchase orders of Roane-Anderson Company?

[fol. 242] A. It was up until the present reprinting, the use

of which commerced about December 1st, 1947.

Q. We will talk about the changes on the reprinting in just a moment. I call your attention also on this original purchase order to the language above the signature line:

"Roane-Anderson Company, acting as agent for and on behalf of the United States, by W. H. Leedom, Purchasing Agent."

Have all purchase orders of Roane-Anderson Company been signed in that way?

A. They have, without exception. .

Q. So far as you know, will purchases continue to be handled upon purchase orders bearing that kind of signature?

A. So far as I know, they will.

Q. In making purchases, Mr. Leedom, do you have to obtain the approval of the Contracting Officer on purchases involving cost in excess of a certain figure?

A. We do, in excess of \$2,500.00 it is required that we first obtain the approval of the Contracting Officer or his

representative.

Q. In practice, has such approval been required on any purchases of less than \$2,500.00?

A. I don't know that it has, although we have obtained it, not prior approval but subsequent approval.

Q. In all cases or just some ?

A. In all cases up to a point recently when it was arranged between the Atomic Energy Commission and Roane-Anderson Company that the approval of orders involving \$2,500.00 or less is discontinued.

[fol. 243] Q. Has there been a numbered purchase order

used in the case of every purchase?

A. In every case where an order was made by telephone or verbally it was invariably confirmed by a regular num-

bered purchase order.

Q. I hand you and ask you to file as Exhibit No. 7 a photostatic copy of the reverse side of the original order, purchase order which you filed as Exhibit B, page 3 to the

original bill. Do you identify this as being an accurate photostatic copy of the Instructions, Terms, and Conditions' on the reverse side!

A. Yes, of that order.

Q. Will you file that as Exhibit No. 7 to the testimony of the complainants?

A. I so file it.

COMPLAINANTS' EXHIBIT 7

Walter H. Leedom

Q. What did you mean when you said it was accurate, of

this particular order?

A. I mean that the revision of the purchase order form incidental to the present reprinting made a slight change in the printed terms and conditions.

Q. So far as Instructions, Terms and Conditions are concerned what was the change made by the revision?

A. The change deleted the third paragraph reading:

"This order does not bind, or purport to bind, the United States Government, its officers or agents."
[fol. 244] Q. And that change became effective December 1st, 1947!

A. Yes, with the release of orders of that date.

Q. Up until that time, paragraph 3 was on the back of the purchase order?

A. That's correct.

Q. How about paragraph 2, has that always been present on the purchase orders?

A. That paragraph appears on every order we have is-

sued without change.

Q. Do you know the source of these Instructions, Terms

and Conditions, where they were obtained?

A. Yes. At the time we commenced operations we had to hastily design a purchase order form and found it convenient to use for that purpose the form then in use by Stone & Webster Engineering Corporation who were operating, and whose forms seemed to be rather well gotten up, and this particular paragraph appeared on their form and was incorporated in ours.

Q. Now, you have said that this purchase order form has been revised. Do you have a blank form of the purchase

order as revised?

A. Yes, a set of the revised form.

Q. How many of the copies in the set contain the terms and conditions on their back?

A. The original copy, No. 2, and No. 3, that is no longer

used, 4, 5, 6, and 7.

Q. Will you file the original of the revised draft as Exhibit 87

A. I do so.

COMPLAINANTS' EXHIBIT 8

[fol. 245] Q. What were the changes made when the revision was accomplished?

A. May I refer to a memorandum I have on that? There are several minor changes.

Q. Ail right.

A. The changes made in the form at the top of the revision were as follows:

Q. You were starting to read from a letter dated August 26, 1947 over your signature.

A. Yes, that would be my complete statement.

Q. Does that letter state the changes that were made upon the revision?

A. It does.

Q. Would you file a photostatic copy of that letter as Exhibit No. 9 to your testimony?

A. I so file it.

COMPLAINANTS' EXHIBIT No. 9

Q. As Exhibit 10, I will ask you to file a photostatic copy of a letter of United States Atomic Energy Commission dated September 3rd, 1947, over the signature of L. Paul McDowell which appears to be in response to your letter filed as Exhibit No. 9.

A. I so file it.

COMPLAINANTS' EXHIBIT No. 10

Q. File the letter of September 3rd, 1947 as Exhibit No. 10.

A. I so file it.

[fol. 246] Q. With respect to the first change referred to in your letter Exhibit 9, you have already discussed that, being the change of shipping directions from the District

Engineer to the United States Atomic Energy Commission. The second change appears to relate to an elimination of the reference to the Office of Price Administration and prices fixed by that office. With respect to the third and fourth changes referred to in your letter Exhibit 9, I will ask you why those two eliminations or changes were directed, namely, the elimination of the material in the lower lefthand corner of the front of the original and the elimination of

paragraph 3 of the Conditions on the reverse side!

A. The printed paragraph at the lower lefthand corner of the original Purchase Order, having reference to the passing of title to the United States Government at the time of shipment was eliminated at the suggestion of the representatives of the Atomic Energy Commission, that it conflicted with the printed notation at the top of the order which read that prices were f.o.b. destination unless other-In addition, it was contended that the wise indicated. wording of that nature might jeopardize the subsequent right of the Government to reject the material after it had been shipped. In the case of the notation on the back of the order indicated as paragraph 3, that was discovered in the review of the wording of the order in connection with combing it for corrections, it was discovered that it had been placed there in error, and that did not apply.

Q. Was it in conflict with the matter over the space for

signature!

[fol. 247] A. That was certainly the thought and certainly it should not have been on the form originally.

Q. In connection with purchases by Roane-Anderson

Company as distinguished from the United States?

A. Absolutely not. I never heard it suggested by anyone.

Q. In your contacts with suppliers, Mr. Leedom, did any other papers pass as constituting a contract of purchase.

beyond the purchase order?

A. No, except that there are frequently orders where drawings or specifications become a part of the order and of course t-e quotation is a part of the purchase contract. Any document referred to in the order would naturally be a part of the order.

Q. Did any supplier ever make inquiry of you concerning

your contract with the Government and its terms?

A. No, we have occasionally had inquiry made as to our credit status and we have frequently informed, in fact it

has been our practice in such instances to indicate the nature of our contract and give them a bank reference.

Q. But there has never been any accepted procedure for apprising suppliers of the nature of your relationship with the United States Government or the contents of the contract?

A. We have never had occasion to disclose any of the

details of the contents of our contract.

Q. Next, I call your attention to the photostat which appears as Exhibit B, page 4 to the original bill filed in the first Roane-Anderson Company case, being an invoice by "Motorola, Inc.," and ask you if that is an accurate photograph of that paper?

[fol. 248] A. I would say that it is although invoices do not

normally come to the Purchasing Department.

Q. Will you file that as Exhibit 11 to the Complainants'

A. I so file it.

COMPLAINANTS' EXHIBIT 11

Q. I notice that this particular invoice refers to Purchase Order No. 40198, which is the one we have been talking about. Is it usual for invoices of suppliers to refer to the numbered Purchase Order issued by Roane-Anderson Company as agent?

A. Yes, that is necessary.

Q. Can you tell us what the usual terms of payment were in transactions of purchases by Roane-Anderson Company?

A. The terms of payment, of course, are as a rule universal in industry, which might be two per cent for cash in 10 days and might be 30 days net or any other discount or time of payment that might be agreed upon.

Q. Did you ever have any supplier that retained title in

order to insure payment?

A. No.

Q. I am going to ask you to file certain other papers which occur in the receiving of procurements. They might not fall under your particular jurisdiction but we will have other employees later to testify about them. I hand you a photostatic copy of tally-in sheet No. 86942 referring to Purchase Order 40198 and ask you if that is an accurate photograph of the tally-in sheet used in that case? [fol. 249] A. It is.

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Q. Will you file that as Exhibit No. 12? A. I so file it.

COMPLAINANTS' EXHIBIT No. 12

Q. Next, I hand you a photograph of Materials Check Sheet, referring to Purchase Order No. 40198 and ask you if that is an accurate copy of that paper? A. It is.

Q. Will you file that as Exhibit No. 13 to your testimony

for the Complainants?

A. I do so.

COMPLAINANTS' EXHIBIT 13

Q. Next, I hand you a photostatic copy of Roane-Anderson Company Receiving, Inspection and Acceptance Report No. 106328 referring to the same purchase order and ask you if that is an accurate copy of that paper?

A. It is.

Q. File that as Exhibit No. 14.

A. I do so.

COMPLAINANTS' EXHIBIT 14

Q. To complete the series of papers used in a typical transaction, I will next ask you to file photostatic copy of the front of Roane Anderson Company check No. 50890 payable to Motorola, Inc., which was filed as Exhibit B, page 6 to the original bill and ask you if that is an accurate reproduction?

A. It is.

[fol. 250] Q. File that as exhibit No. 15.

A. I do so.

COMPLAINANTS' EXHIBIT 15

Q. I will ask you to file the reverse side of the same check as Exhibit No. 16.

A. I so file it.

"COMPLAINANTS' EXHIBIT 16

Q. And then, finally, I will ask you to file as Exhibit No. 17 if you can identify it as being an accurate portrayal, the three pages constituting "Public Voucher No. 40-7528" plus a fourth page which sets forth certain printed matter, I believe, appearing on the reversed side of page 1 of the voucher. Can you identify those sheets as being accurate copies of that voucher!

A. Yes, I recognize these and identify them.

Q. Will you file all four pages as Exhibit No. 47?

A. I so file them

COMPLAINANTS' EXHIBIT 17

Q. Now, on the third page of Exhibit No. 17, between two red lines appears an item relating to the Motorola purchase to which the papers we have been exhibiting relate. Is that a continuation of the same treatment of that item?

A. That's correct. That's a part of the same transac-

tion

Q. On the first page, I notice that certain printed matter has been x'ed out, namely, the words "and that State or local Sales Taxes are not included in the amount billed." Can you tell us why that matter was eliminated!

[fol. 251] A. That is undoubtedly eliminated because the

tax is being paid under protest.

Q. You have already referred to certain agreements we have with the State of Tennessee for the handling of the problem?

A. Instructions from the Atomic Energy Commission for

handling it.

Q. Now, you have so far described the practice followed by Roane-Anderson Company in purchasing goods and materials so far as such practice comes within your jurisdiction. Has the same practice been followed by Roane-Anderson Company since you were first associated with it with the exception of the revision of the purchase order?

A. Yes, there has been no change in the procedures, practices, habits or thought with reference to these com-

mitments.

Q. So far as you know, the same practice will be adhered to in the future?

A. So far ac I know, it will.

Q. Mr. Leedom, there appears to be an afficle in the Roane-Anderson Company contract to the general effect that title to goods shall pass to the Government at point designated by the Contracting Officer in writing. Do you know whether or not that designation has ever been given by the Contracting Officer!

A. I don't believe it has. We could find no evidence that

that had ever been done.

Q. Has any question ever been raised by the Contracting

[fol. 252] Officer or anybody on behalf of the Atomic Energy Commission which would imply or expressly indicate that the Contracting Officer did not think that that title did not pass to the Government at the time of receipt of the goods. That's a pretty involved question?

A. I am not sure that I have the negatives and positives

straightened out.

Q. I am not quite sure that I have got them straightened out. You say that the Contracting Officer had never exercised any right to designate in writing a point at which title should pass?

A. We cannot recall that he did nor can we find any

record and I am inclined to think he has not.

Q. Has the Contracting Officer or any member of the Commission ever said that the passing of title was delayed until a point of time later than the receipt of goods?

A. No.

Q. Has the question of the time and place of passing of title ever been discussed between Roane-Anderson Company and the Atomic Energy Commission?

AS Yes, the Project Manager made that request in writing and I have not the date in mind but I drafted the letter

which he signed, requesting-

Q. You mean the Project Manager of Roane-Anderson Company?

A. Yes.

Q. Has there ever been any action taken or words expressee indicating a place or time of passing of title otherwise than the place and time of receipt of goods?

[fol. 253] A. Nothing but the answer to that letter which

was immediately recalled by the representative of the

Contracting Officer who wrote it.

- Q. How long was it between the letter and the recall? A. Two or three days.
- Q. Has Roane-Anderson Company ever had in its care, custody or possession, so far as you know, any property that it did not regard as being owned by the United States Government?

A. They have not.

Q. Has the Roane-Anderson Company, so far as you know, ever regarded itself as acting otherwise than as agent for the United States in purchasing under this contract?

A. I can say they have not.

Q. Do you want to amplify that statement?

A. I can amplify it by stating that I have never heard anyone in the Army, the Atomic Energy Commission or Roane-Anderson Company state otherwise than that title passed immediately from the selfer to the Government directly.

Q. Do you mean that representatives of the Atomic Energy Commission have expressly said that it was their intention that title was passed directly to the United States?

A. I have never heard it questioned or discussed. In fact,

it has been a general assumption.

Q. Does Roane-Anderson Company take out any insurance on property in its possession?

A. No.

Q. Now, Mr. Leedom, your deposition is being fill or [fol. 254] will be filed in two cases. The first of them involves the use tax and that case involves purchases by Roane-Anderson Company from outside the State of Tennessee, and that is Cause No. 65015. The other case is the one involving the sales tax where there is a purchase by Roane-Anderson Company from a vendor within the State of Tennessee, and that is Wilson-Weesner-Wilkinson Company case No. 65164. So that the record in the second case may be complete, I hand you "Purchase Requisition No. G7901-Y which is exhibited as page 1 of Exhibit B to the original bill in the Wilson-Weesner-Wilkinson Company case and ask you to identify and file that as Exhibit 18.

A. I identify it and so file it.

COMPLAINANTS' EXHIBIT 18

Q. And next the Purchase Order No. 40721, will you identify and file that as Exhibit 19?

. A. I identify and file that.

COMPLAINANTS' EXHIBIT 19

Q. What copy does that appear to be?

A. This is a photostat of copy 5 which is a Corps of Engineers' signature copy.

Q. What was the date of issuance of that purchase order?

A. August 15, 1947...

Q. Is it true that the original of that purchase order would conform so far as the printed provisions are con-

cerned to the original of the purchase order used in the Motorola case!

A. It is.

Q. And that goes also to the "Instructions, Terms and Conditions printed on the reverse side? [fol. 255] A. That's correct.

Q. Now, will you identify and file as Exhibit No. 20 Change Order No. 1 which changed Purchase Order No. 40721?

A. I so identify and file it.

COMPLAINANTS' EXHIBIT 20

Q. Next, will you identify and file as Exhibit No. 21 the invoice from Wilson-Weesner-Wilkinson Company?

A. I identify and file it.

COMPLAINANTS' EXNIBIT 21

Q. And as No. 22 the "Receiving, Inspection and Acceptance Report No. 111688!

A. I identify and file it.

COMPLAINANTS' EXHIBIT 22

Q. I now hand you photostatic copy of tally in sheet No. 5495 relating to the purchase from Wilson-Weesner-Wilkinson Company. Will you identify and file that as Exhibit No. 23?

A. I identify and so file it.

COMPLAINANTS' EXHIBIT 23

Q. Was there a "Materials Check Sheet" used in connection with that particular purchase?

A. I don't know. There might not have been. It would

not be necessary.

Q. Why wouldn't it be necessary, Mr. Leedom't

A. That's a large piece of equipment and may have been identified at sight and the Receiving Report prepared [fol. 256] directly. I don't know. I am suggesting that that might have happened to it.

Q. Did that sometimes happen in connection with large

heavy shovels and such items?

A. There would be no detailed check to make of a large piece of equipment. It's a matter of identifying it.

Q. Next, there appears to be "Supplement No. 1 to the Receiving, Inspection and Acceptance Report" which you have just filed as Exhibit No. 22. Will you file this Supplement as Exhibit No. 24.

A. Yes.

COMPLAINANTS' EXHIBIT 24

Q. Will you identify and file as Exhibit No. 25 checks. No. 54005 issued by Roane-Anderson Company to Wilson-Weesner-Wilkinson Company?

A. I identify and so file it.

COMPLAINANTS' EXHIBIT 25

Q. Next, please identify and file as Exhibit No. 26 "Public Voucher No. 40-15549 or rather photograph of it, consisting of two pages?

A. I identify and so file it.

COMPLAINANTS' EXHIBIT 26

Q. I believe that voucher includes the amount paid to Wilson-Weesner-Wilkinson Company for heavy equipment?

A. That's correct.

Q. Is there any difference in purchase procedure where the purchases are made from suppliers outside of Tennes-[fol. 257] see from cases where the purchases are made from suppliers inside of Tennessee?

A. There is no difference in the purchases. You are speaking now about the means of accounting for the state

sales and use tax.

"A. There is no difference in the purchases. You are speaking now about the means of accounting for the state sales and use tax."

.Q. No, I mean in the use of forma?

A. No, we use the same form. There is no reason for making any difference in the formal commitment.

Q. And the same general shipping directions and contractual provisions are employed in both cases?

A. The Instructions are noted in the Order to cause the material to be shipped as desired.

Q. Is there anything further, Mr. Leedom, that you might want to say about either the agency status of Roane-

Anderson Company or as to the time of passing of title of

purchases to the United States of America?

A. I can think of nothing that has not already been eovered in the questions and answers. No questions have been raised by any supplier. I have signed some 52,000 orders is about all, and no one has ever questioned their agency status that I can recall.

Cross-examination.

By Mr. Humphreys:

Q. Mr. Leedom, you have undertaken to explain certain [fol. 258] changes that have been made in the wording of purchase order forms. I notice from that photostatic copy of a letter dated August 26th, 1947 that the question of change in purchase order form was brought up in that letter that you wrote to the Atomic Energy Commission. Has there been any correspondence between Oak Ridge and the United States Army Engineers or the United States Atomic Energy Commission relative to the contents of purchase orders other than this one letter?

A. Ndon't recall any others.

Q. This is the only letter that has been written with regard to it?

A. We lived by the original form without any question

having been raised about it.

Q. As a matter of fact, the original form was not the subject of the inquiry or approval by the U. S. Army Engineers or by the U.S. Atomic Energy Commission until you originated the question in your letter of August 26, 1947; isp't that true?

A. It was examined by someone, by whom I have forgotten now, before made effective, of course.

Q. Do you have any written evidence of that f

A. I don't recall it.

Q. Do you know who it was examined it?

A. No, I don't recall that.

· Q. Do you know what authoritative position he had to pass on the contents of it?

A: Well, there would be no question about the authority [fol. 259] of anyone to pass on it because he would have been the representative of the Contracting Officer.

Q. If you could remember who it was would you suppose that is who it would be?

A. It would have been. We would not have consulted nyone else.

Q. So, as matters now stand, you are unable to supply ne record with any evidence of the original order form wer having been passed on by anyone for the Contracting Officer?

A. Other than the evidence that over 43,000 had been pproved by the authorized representative of the Contracting Officer.

Q. In other words, the purchases involved were aproved?

A. That's right:
Q. Now, what was it that you say brought to the attention Roane-Anderson Company the reasonableness of making

nanges in forms, that is, changes 3 and 4 as set out in our letter, why was it suggested that those changes be ade?

A. I am sure that I understand the question.

Qo Why was it conceived to be necessary to change the d order form so as to eliminate those matters mentioned paragraphs 3 and 4?

A. Those changes occurred in connection with a general amination, a minute examination of the wording of the rm by a representative of the Atomic Energy Commission, and they just discovered the wording that they ought had best be removed and we saw no reason for not ol. 260] concurring. It did not seem to be important at the time, so we made them without any objection.

Q. Now, the first change that the Atomic Energy Comssion ordered stricken out upon its examination of the der form was the provision in the order form to this ect:

"The material and/or equipment to be supplied against this order is for the account of the United States Government, and becomes property of the Government at the time it is shipped."

They ordered that to be eliminated from the purchase

A. That's correct, they suggested the elimination and made no objection.

2. Do you have any communications or correspondence the the Commission wherein this matter was discussed?

A. No, as I recall that was by telephone and we saw no reason for taking any exception to their suggestion.

Q. The statement, "the material and/or equipment to be supplied against this order is for the account of the United States Government and becomes property of the Government at the time it is shipped," that statement is contrary to the statement in the contract that the goods, material and supplies become the property of the Government upon inspection and acceptance, isn't it?

A. I don't understand that to be the case. I don't know that I can recall the wording of the contract, but to the best of my recollection, it is that the point of transfer of title is to be indicated by the Contracting Officer,

[fol. 261] is to be as indicated.

Q. I want to ask you if that was the occasion for the Atomic Energy Commission requiring the change as noted in paragraph 3 of the letter of August 26th to make the purchase order form comply with the provisions of the contract relative to transfer of title?

A. No, that was not it. There were two reasons: One was they thought—I did not agree with them and do not, but they thought—I on speaking of that wording of that notation—conflicted with the printed notation on the top of the order that provided that the prices were f.o.b. destination.

Q. How would that happen?

A. It would not have any effect but that was what they thought.

Q. Of course, this is the telephone information that you are giving?

A. Yes.

Q. What else was the reason?

A. The other reason was that they felt that the inclusion of that note might operate to deprive the Government of the right to reject material subsequent to shipment.

Q. A right reserved to it in the contract?

A. Well, the inherent right to reject it.

Q. That is a right reserved to it in the contract, to reject it upon inspection. If it does not care to accept it as Government property; is that right?

Mr. Fowler: We object to counsel calling upon the witness for an interpretation of the meaning of the contract.

to

le can ask him what has taken place in performance of ne contract.

fol. 262] Mr. Humphreys: What was the question?

(Read by Reporter): That is the right reserved to it in secontract, to reject it upon inspection if it does not are to accept it as Government property; is that right?

By Mr. Humphreys:

Q. Further, for Roane-Anderson Company you recogzed that that right is reserved to the Government, do you

A. The Government has a right to reject a shipment at

ly time subsequent to shipment.

Q. Now, Mr. Leedom, was the subject of the change of lese purchase order form provisions, was that brought up ter these suits were commenced and on account of the lits?

A: No, before. These changes were incidental to the cessity for ordering a new supply of forms. Our supply forms was down to the point that we had to order a new apply, and we took that occasion to make the changes adapt the form to the Atomic Energy Commission's rection of the operation instead of the former Army

rection, and in connection with that revision the entire rm was combed for other corrections that might be in

der.

Q. Mr. Leedom, in each instance these supplies and iterials that were ordered and bought were paid for from pane-Anderson Company funds and Roane-Anderson Company was reimbursed by the United States Government becausely; isn't that true!

A. Of course, my activity concerns purchase only, and

ol. 263] not payment.

Q. Now, you were asked on your direct examination in red to the practice relative to the issuance of a written der by the Contracting Officer in regard to the transfer of le, and you said that the "Project Manager" had rested a ruling relative to that!

A. That's correct.

Q. Do you have a copy of that letter!

A. I have a copy of a letter to the Contracting Officer I of his response. There is a notation at the bottom of hat is not a part of the communication. (Passes letter counsel.)

Q. I believe you said that as of this date the Contracting Officer has never given any written notice under Article IX of the acceptance or rejection of any of the materials, tools, machinery, equipment and supplies which Roane-Anderson Company have purchased?

A. I don't recall making any statement on that subject, but I am not qualified to make that statement. That would

pertain to receiving and warehousing operations.

Q. Then do I understand that as you interpret your testimony, you have not testified relative to this matter

I have asked you about at all on direct examination?

A. I have not testified with reference to Government acceptance or rejection of materials. What I said was that representatives of the Atomic Energy Commission felt that the inclusion of that notation in the lower lefthand corner of the old form might operate to prevent the Gov-[fol. 264] ernment from rejecting a shipment after it had been made. Whether it has been continued or not I would not know. I am at least one step removed from that operation. We do, of course, have frequent rejections.

Q. But I thought I understood you to testify on direct examination when you were asked relative to Article IX of the contract in regard to the passing of title, I thought I understood you to state that so far as you were aware, no other event had been looked to to determine the time of the

passing of title other than the fact-

A. I recall that question. My answer to that question I

will be glad to repeat.

Q. What I am asking you in regard to, without just stating it in a different manner, is it true or not that the Contracting Officer so far as you are advised, has never given any written notice of acceptance or rejection?

A. I am not qualified to answer that question.

Q. Of the materials, tools, machinery, equipment, supplies and so forth bought by Roane-Anderson Company under this contract with the Atomic Energy Commission, and your answer is that you are not qualified to answer that?

A. No, that would be a receiving function in the Receiving

Department activity.

Q. Who would know about that?

A. Mr. Holland would know.

Redirect examination.

By Mr. Fowler:

Q. I believe that what you have testified with reference [fol. 265] to a written designation by the Contracting Officer related to the designation of a point at which title passes?

A. That is correct, and what I said was that we had no recollection nor could we find any record of that point or those points having been designated as provided in the contract, and I don't think it has been done.

Q. And that is a different matter from acceptance or

rejection for defects?

A. That's correct.

And further deponent saith not.

Walter H. Leedom, By A. C. Dore, Court Reporter.

Sworn to before me 13 December, 1948, McNabb, Notary Public. My Commission expires: ——, —.

[fol. 266] Deposition of Ralph Callahan—Filed July 1,

The next witness, RALPH CALLAHAN, recalled for further

Cross-examination.

By Mr. Humphreys:

Q. Mr. Callahan, I wish you would explain the manner in which payment is made for these materials and supplies which are bought by Roane-Anderson Company under the contract, with whose funds they are paid for what method is followed in the reimbursement of Roane-Anderson Company?

A. To the extent that Government money was available, we paid for all purchases from the Government money and accounted to the Government for that expenditure and to the extent that Government moneys were not available we used funds which had been advanced by Roane-Anderson Company in its corporate capacity to Roane-Anderson in its capacity as agent. Those two funds were commingled so

that there was one working fund. All purchases were paid for from that fund. Consequently, I could not say as to any particular purchase order whether it was paid for by Government money or paid for by Roane-Anderson Company agency money.

Q. To what extent under the contract was it contemplated that the United States Government would advance funds to Roane-Anderson Company with which to purchase materials

and supplies to discharge its contract?

A. At the inception of these contracts, the letter contract indicated that funds would be advanced by the Government [fol. 267] to carry on its operation, but because of the great amount of detail in getting plans and procedures worked out, the contract as finally drawn did not provide for an advance of funds by the Government but it was contemplated by the contract that the revenues could be used, in fact it was directed that they were to be used to reduce the cost of the work. To that extent the Government did permit has to use their funds in the payment of obligations arising under this contract.

Q. I thought I understood your statement this morning—of course, I am just trying to get my own mind clear on that—I thought I understood you to say that revenues collected were kept separately and paid over to the Government be-

cause this was a cost-plus contract?

A. That is a rather complicated accoupting procedure. Initially, all monies-and this is solely for accounting purposes-when received are credited to an account called a Collection Account and a Bank Account is maintained under that name. As money is required, transfers are made from that Collection Account to a Disbursing Account and in that Disbursing Acount is where the commingling of the Government funds with the agency funds occurs. no reason other than the fact that it would facilitate auditing that a separate account was established for collections, and to carry that a step further, we withheld-I might say this, that moneys on the collection of revenues were returned to the Government or paid over to the Government by a credit-[fol. 268] ing process. In other words, if we spent, if it showed we had spent for purchases \$100,000.00 and the money had previously been spent from this Disbursing Account, on the Public Voucher which was rendered to the Government we showed expenditures \$100,000.00 and deduc-

ted from that \$100,000.00 of revenue with the consequence that the amount was zero. In all cases it did not work out mathematically that way, for the reason that we might have spent \$1000,000.00 without getting credit for but \$50,000.00, in which case it built up a revolving fund of Government money and in that way we retained enough of the revenue money insofar as it was possible to do so, to operate this contract, but I don't want to give the impression that the revenues and what we were able to build up from withholding revenues was sufficient at all stages of the contract wholly to finance it. As the work progressed and as the income from this area became greater, it was possible to finance the work entirely from Government revenues by simply holding them intact, but there was a time when the company in its private capacity did advance money to this agency contract, as we term it, to supplement Government moneys.

Q. Do you have any office record that would support your conclusion that the Roane-Anderson Company as a corporation loaned Roane-Anderson Company as an agency money, or is that just your assumption as to the character in which the parties acted?

A. That's my assumption.

Q. That is not supported by any corporate records? [fol. 269] A. Not to the extent of any corporate records except that under our present accounting system all of the records and accounting records are referred to as the Roane-Anderson contract.

Q. So, without requiring the Court to get all of its understanding exactly from the wording of the contract, it was not contemplated that the money to buy materials and supplies would be advanced by the Government, but that Roane-Anderson Company would advance that money except that it could look to be reimbursed from the revenues and also of course from the Government?

A. I would not say that. It was contemplated first that the revenues would be used, and the contract specifically provides that the only purpose for which the revenues can be used is to reduce the cost of the work, and in order to reduce the cost of the work obviously it would mean that you first spent it and then credit the amount against it. At the time this contract was established and no one knew exactly to what extent the revenues would be sufficient, so

that in the early stages it was necessary for the company to advance certain moneys. Now as to whether, without trying to reach any legal conclusions as to the effect of it, it might be maintained that to the extent we spent our own money we were reimbursed, or to the extent we advanced money it was a loan to the agency contract. I would simply say it was our understanding and the way that our philosophy of operation was conducted that we always considered that it was an advance from Roane-Anderson Company in its private [fol. 270] capacity to Roane-Anderson Company in its agency capacity, and our records are so set up that that implication in my opinion can be drawn from it, and that has been since the inception of the contract.

Q. May it be that your philosophy in that regard is in anywise shaped to meet the tax questions that might arise

on account of tax liabilities?

A. No, I would not say so for the reason—you didn't ask my reason.

Q. No, I did not.

A. Simply for the reason that it is immaterial to Roane-Anderson Company in that it is a purely financial proposition as to whether this sales tax is paid to the State of Tennessee or not.

Q. It is not immaterial to the State of Tennessee.

A. I believe I have a copy of our original letter of intent.

Mr. Fowler: Suppose we put that letter in the record. Mr. Humphreys: It is in the record.

And further deponent saith not.

Ralph Callahan, By A. C. Dore, Court Reporter.

Sworn to before me 13 December, 1948, McNabb, Notary Public. My commission expires: — —, —. [fol. 271] Deposition of Nobel J. Holland Filed July 1, 1949.

The next witness, Nobel J. Holland, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your full name, age, address and occupation.

A. Nobel J. Holland, 332 East Fairview Road, Oak Ridge, Tennessee, General Superintendent of Warehousing for Roane-Anderson Company.

Q. How old are you?

A. Thirty-five.

Q How long have you held the position of General Superintendent of Warehousing for Roane-Anderson Company!

A. Since July 23rd, 1944.

Q. What are the duties of this position?

A. To receive, store and issue all materials consigned

to Roane-Anderson Company.

Q. As an incident to the discharge of your duties in that connection, are you familiar with the way in which shipments received at Oak Ridge upon order of Roane-Anderson Company have been handled?

Q. Well, to our extent of handling them, yes, I am famile

iar with it.

- Q. Is the receipt of goods or materials and so forth which Roane-Anderson Company orders under its contract with the United States Government under your jurisdiction? [fol. 272] A. Yes.
- Q. Are we therefore to assume that you do know the way in which they are handled when received and what is done with them?

A. Yes.

Q. Will you tell us the procedure that is gone through with upon receipt of those goods and first tell us is there a receiving point for purchases of Roane-Anderson Company in the Oak Ridge area?

A. Yes.

Q. Where is that point?

A. That is C.-1 warehouse.

Q. Is that a Government-owned warehouse?

A. Yes.

Q. What happens when goods are received there upon

the order of Roane-Anderson Company?

A. The goods are inspected at the time the common carrier delivers them to our receiving warehouse for damage and number of containers, and then we open the containers and visually inspect and physically count all items in those containers, preparing the proper field receiving document at the time of inspection.

Q. As to number of items, what do you check against?

A. We compare the number of items against the vendor's packing list together with our copy of the purchase order.

Q. Does that also provide a check against the quality or kind of item?

A. Yes.

Q. Is such a comparison and inspection made when received?

A. Yes.

- Q. Do you actually uncrate the goods for [fol. 273] A. Yes.
- Q. At some stage in the process is a Government label or brand put on the goods?

A. Yes.

Q. What is the nature of that?

A. In the instances where we have the proper surface of wood, we will burn the symbol with an electric iron. "U. S.-R. A."

Q. What do those letters mean?

A: That they are the property of the United States Government, and that the Roane-Anderson Company is the custodian.

Qr Just when is that branding or labeling done.

A. At the time of the receipt within the Receiving Warehouse.

Q. You have said that a part of that procedure involves the preparation of particular documents. Just what do you mean by that?

A. We have a tall--in form that is used as a field document, Rec.-6.

Q. I hand you at this moment document filed as Exhibit 12 to complainants' testimony and ask you if that is the kind of document you are talking about now?

A. Yes.

Q. Just describe the procedure in filling that out, what is done and who does it?

A. The checker, receiving and issue clerk will take from the transportation document or the common carrier's document the packing list and prepare this document showing the vendor, shipper, purchase order number, date of arrival, how it was shipped and all other pertinent information that might pertain to this shipment, such as express or [fol. 274] waybill number, transportation bill, whether it was freight paid or collect. In case of carload shipments the car number and initials and whether or not the seal was broken and by whom. Then he indicates the number of units received that is, cartons, crates, boses and so forth.

Q. What signatures appear on that exhibit No. 12 that

you have in your hand? .

A. The signature of J. A. Jackson, a receiving and issue clerk of the Warehouse Department of Roane-Anderson Company, and Mr. Fulghum—I don't know his initials, an employee of AEC.

Q. Was Jackson the checker that you have referred to?

A. Yes.

Q. Was Mr. Fulghum an employee of the Atomic Energy Commission?

A. Yes.

Q. Was he an inspector for them?

A. Yes.

Q. What other documents did you have reference to, besides the tally-in sheet?

A. This is our field document. From this field document we prepare a receiving, inspection and acceptance form.

Q. Do you have a Materials Check Sheet!

A. Only in the instances of a packing list where it is one possible to take one of these forms out of the Warehouse, where we would happen to have dirty material, we would have a work sheet on a columnar pad. It is not a pre-numbered document.

[fol. 275] Q. Proceed with your explanation of Receiving,

Inspection and Acceptance Report.

A. I gave the REC number of this document as 6. It should be rec.-8.

Q. D. you mean the tally and

A. Yes. The Receiving, Inspection and Acceptance Report document is the final document that we prepare in a typewritten form taken from this tally-in field work sheet which is identical, has the same identical information in it that the field work sheet and the tally-in sheet has.

Q. Now, you have said that Mr. Fulghum was an AEC employee and an inspector for the Commission. Did he or some similar inspector in the employ of the Commission inspect the materials as they came in?

A. No, they got spot checks at their discretion.

Q. Such as they made, they would sign the tally in sheet along with the Roane-Anderson Company employee?

A. That's correct.

Q. Do you know whether the Atomic Energy Commission has ever made any inspection beyond that spot inspection at the time of the receipt of goods?

A. Yes, they have a continual spot check inspection after

the material has been placed within the warehouse.

Q. For what purpose?

A. For determining that the material is properly warehoused, properly issued, and that it goes to the proper location.

Q. Does that inspection after warehousing relate en-[fol. 276] tirely to the handling and disposition of the goods after receipt?

A. Yes, I believe so.

Q. Has there been any change in the practice of the Atomic Energy Commission with repect, to spot-checking goods at the time of receipt?

A. Within the last few weeks they have discontinued

their checker at our warehouse.

Q. What does that mean, that they rely only upon the inspection by Roane-Anderson Company?

A. I assume so.

Q. The Atomic Energy Commission still has the right to make such a check.

A. Yes.

Q. Now, Mr. Holland, when these goods are moved from

the receiving platform where are they placed?

A. They are placed in various warehouses within this area of Oak Ridge for proper storage, to be held until such time as they are issued for use.

Q. Now, the description of the receiving procedure that you have given us informed us as to what has happened since you have been occupying your present position with Roane-Anderson Company?

A. Yes.

Q. And the only variation in that procedure has been the

recent termination of inspection at point of receipt by the Atomic Energy Commission?

A. That's right.

Q. So far as you know, the practice as you have described [fol. 277] it, with that change, will continue to be followed?

A. That's correct.

Q. Is that procedure the same, regardless of the source of the shipment, as to whether it is within Tennessee or without Tennessee?

A. Yes.

Cross-examination.

By Mr. Humphreys:

Q. Mr. Holland, Article IX, paragraph 1 of the contract between the Roane-Anderson Company and the Atomic Energy Commission provides that title to all materials, tools, machinery, equipment and supplies which the contractor purchases in accordance with Article I of this contract and for which the contractor shall be entitled to reimbursement under Article V shall vest in the Government at such point or points as the Contracting Officer may designate in writing. To your knowledge has there been any designation in writing where that title passes?

A. No.

Q. And it provides further "That the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that upon such final inspection the contractor (that's the Roane-Anderson Company) shall be given written notice of acceptance or rejection as the case may be." Is written notice of the acceptance of those materials and supplies made and given to the [fol. 278] contractor by the Atomic Energy Commission?

A. Not to my knowledge.

Redirect examination.

By Mr. Fowler:

Q. Mr. Holland, I call your attention to Exhibit 12, which is the tally in sheet. I also call your attention to Exhibits 13 and 14 which are Materials Check Sheet and Receiving,

Inspection and Acceptance Report. Are those the only documents that you know of which might amount to a written document or signed document on behalf of the Atomic Energy Commission relating to the acceptance of goods?

A. This typed document is the only thing I would know anything about within the three papers, Exhibits 12, 13 and 14 having the signature of J.P. Fulghum.

Q. Who was an employee of the Atomic Energy Commission; is that correct?

A. Yes.

Q. Beyond those documents you don't know of any writings given by the Atomic Energy Commission relative either to acceptance or rejection of goods?

A. As I said before, not to my knowledge that I can recall. These are the only documents that I would have

anything to do with.

And further deponent saith not.

Noble J. Holland, By - Court Reporter.

[fol. 279] Deposition of Dwight A. Smith Filed July 1, 1949

The next witness, Dwight A. Smith, being first duly sworn, deposed as follows:

Direct-examination.

By Mr. Fowler:

Q. Give your full name, age, address and occupation.

A. Dwight A. Smith, 37 years old, my address is 113 West Magnolia Lane, Oak Ridge. Accountable Property Agent.

Q. Who is your manager?

A V

A. Mr. Trent, Director of Supplies AEC.

Q. You are employed by the Atomic Energy Commission? A. Yes.

Q. How long have you held the position of Accountable Property Agent?

A. Two years, a little better than two years.

Q. That will take us back to the latter part of the year, 1946?

A. Yes.

Q. What are your duties in that position

A. Responsibility to see that the contractor maintains accountability of all property received by him and in his possession.

Q. Are you familiar with the procedure and practices followed in the receipt of goods by Roane-Anderson Com-

pany?
A. Yes.

[fol. 280] Q. It seems, Mr. Smith, that Article IX of the contract between Roane-Anderson Company and the Atomic Energy Commission provides that title to goods ordered by Roane-Anderson Company shall pass to the United States at point or points designated in writing by the Contracting Officer. What has been the practice under that provision of the contract?

A. The Government always maintains title to the property. The contractor itself never has title to the property.

It always belongs to the Government.

Q. Have you ever seen or some into contact in the discharge of your duties with any written designation by the Contracting Officer of a point at which title to any goods should pass to the United States Government?

A. Not in this particular Roane-Anderson Account. In the case of another contractor on the area it would be true.

Q. What contractor was that?

A. E. I. DuPont de Nemours Company back in 1944.

Q. That was back in 1944?

A. Yes.

Q. Three years before the Sales Tax Act was passed? A. Yes.

Q. Is it true then, so far as your experience and observation goes, that there has never been any action taken by the Contracting Officer under that provision of the contracts I have referred to by way of designating in writing a point at which title should pass to the United States Government? [fol. 281] A. I would not be familiar with that phase of it.

Q. Have you ever heard of any such designation?

A. No.

Q. Have you ever heard of any such designation orally, not in writing?

A. No.

- Q. How many receiving points does Roane-Anderson have?
 - A. They maintain two receiving stations.

Q. Where are they?

A. C-1 Warehouse and Division 5.

Q. What ic Division 5, is that a warehouse too?

A. Division 5 is the maintenance of equipment shop that was taken over last August by Roane-Anderson Company for repair of materials on the area.

Q. Do you follow the same receiving procedure at both

points? -

A. Yes.

Q. Article IX of this contract also reserves to the Contracting Officer the right in writing to accept or reject goods. What has been the practice in respect to acceptance and rejection?

A. The Contracting Officer or the representative is stationed at the various receiving points for the purpose of making independent check to determine that the type of property that was being received by the contractor was the property for which the Government had paid out its money. For example, if the Government ordered aluminum buckets that they did not get but got zinc buckets, he prepared a quality and quantity check, and prepared an independent [fol. 282] Receiving Report which was forwarded. It is just another type of Receiving Report. It was forwarded to the cost section of AEC and held in suspension until the contractor received was prepared so that a comparison could be made between what the contractor received and what the Government received in order that a comparison be made between the two.

Q. When would the information come through from the contractor?

A. It is quite possible that it would be some time before it would get completely through, but immediately this check was forwarded to the cost section.

Q. And that check sheet would be signed by the representative of the Atomic Energy Commission?

A. Yes.

Q. Was that procedure followed in each instance?

Well, yes, this representative only performed these checks an a percentage basis. We had 20 or 25 various checkers, and one Government representative could get only his proportionate part of it.

Q. Was that what they call a selective or spot check?

A. Yes, it was more or less a selective or spot check. My officer also performed various types of spot checks in addition to the one representative stationed there all of the time.

Q. Now, I hand you Exhibit 14 filed in this case, which is Receiving, Inspection and Acceptance Report and you will notice that over the signature at the bottom, which is the [fol. 283] signature of J. P. Fulghum whom I understand to be an employee of the Atomic Energy Commission, that the following appears:

"Approved in accordance with the requirements of the Administration Audit Manual."

I also hand you an exhibit filed in the ease, being a copy of paragraph 202.3 of that Manual and ask you if that is the part of that Manual that is referred to over that signature?

A. Yes.

Q. Mr. Smith, have the provisions of that paragraph 202.3 been uniformly observed by the Atomic Energy Commission?

A. To my knowledge, in all cases.

Q. Has the Contracting Officer under the Atomic Energy Commission required any inspections other than the inspection contemplated by that section?

A. Yes.

Q. What kind of inspections and for what purpose?

A. My duties were defined in Audit Manual TM-14-910, which was a Property Accounting Manual for cost plus a fixed fee for prime contractors, and in there it defines several types of checks that the Accountable Property Agent is required to make to determine that the Contractor's method of receiving, storing and issuing of property is adequate. They are defined as quality checks, quantity checks and the checking of issue slips prepared by the contractor to show that they are properly signed and that due credit is taken for property disbursed.

[fol. 284] Q. Is the purpose of those supplementary checks to determine the status, condition and handling of property considered by the Government to be its property?

A. In all cases it is to be its property. These accounts, I might say, were marked the accounts of Dwight A. Smith,

Accountable Property Agent maintained by the contractor. Each stock record card is so marked.

Q. What is the attitude of your office with reference to

who owns these purchases from the time of receipt?

A. We have never had any thought in mind but what it is Government property. There has been no question but that it is Government property in the possession of a contractor who was responsible for the property in the furtherance of his contract.

Q. Now, the practice and procedure as you have described them, are they the same regardless of whether the good; are shipped from outside of Tennessee into Oak Ridge or shipped from inside of Tennessee into Oak Ridge?

A. They are the same. They are all consigned to the United States Atomic Energy Commission for Roane-Anderson Company or the other contractors. There are some cases where incorrect billing is sometimes shown on documents but that is more or less a mistake by the vendors because the purchase orders are written U.S. Atomic Energy Commission for Roane-Anderson Company.

Q. Recently, has the Atomic Energy Commission aban-

doned its inspection at the time of receipt?

A. I am not sure of that in all cases. In most cases, they have.

[fol. 285] Q. Have they come to rely upon the inspection made by the contractor?

A. Yes.

Cross-examinafion.

By Mr. Humphreys:

Q. This same Article IX referred to in your direct examination contains the further provision that upon final inspection the contractor shall be given written notice of acceptance or rejection, as the case may be. As matter of fact, is there ever any written notice of acceptance of the goods made?

A. The Receiving Report is to be the written notice of acceptance and if there is an exception to any shipment, this paragraph here is supposed to refer to a separate document which will show any damage, shortage or conditions not acceptable.

Q. Other than the execution of that instrument to which you have referred which is Exhibit 14, and other related

documents which are Exhibits 12 and 13, there are no other written notices of acceptance made by the Contracting Officer to the contractors; is that true?

A. I don't believe that I exactly understood that. I am

sorry.

Q. Other than those documents there which are Exhibits 12, 13, and 14, there are no written notices of acceptance or rejection?

A. This to my knowledge is a standard acceptance in which the Contracting Officer is notified of the acceptance of

the shipment.

[fol. 286] Q. I believe you say that that written acceptance, if that is what it amounts to, is only executed in possibly some ten per cent of the instances of purchase?

A. This particular document here, which is a receipt, is in all cases regardless of the type of shipment. The check sheet attached to the 1034 Form is only on a percentage.

basis.

Q. Is the concurrence of the Contracting Officer's representative in this particular case, Mr. Fulghum, in that sheet, was the inspection gotten in every instance or is it just come percentage of cases?

A. He did not check all of the shipments he signed but he more likely discussed or reviewed those things more or

less.

Q. But he does sign all of them?

A. Yes, he signs them all. There is only one checker.

Q. Let me understand you, now. Do you say that the purpose of his signing is to designate the acceptance by the Contracting Officer of those materials as being materials of the U.S. Atomic Energy Commission?

* A No, I could not make that statement. He only signs that the conditions outlined in this particular Manual are

met

Q. He does not sign it for the purpose of indicating transfer of title?

A. Only indirectly.

Redirect examination.

By Mr. Fowler:

Q. Do you have some further statement to make? [fol. 287] A. Yes, the Contracting Officer has to satisfy himself that the contractor's method of receiving is ade-

quate, and this independent check made is to notify the Contracting Officer of any change in any way.

Q. Any discrepancy?

A. Any discrepancy or any haphazard method of receiving or handling material.

Q. So far as you know, the Contracting Officer has never required any other method of handling receipts different

from the one you have described there?

A. That's right, other than in other contracts there have been other individuals designated. In other contracts I have two or three fellows to do this particular thing. The reason for that is the Manual says his duties in both cases are accountable to the Property Agent, the duties performed by this checker here.

Q. But even in those cases where somebody out of your office does it, and you were talking about other contracts than the Roane-Anderson Company, the receiving procedure

is the same?

A. Yes.

Re-cross examination.

By Mr. Humphreys:

Q. But in those other cases, is the purpose of the inspection and the signing of the sheet for the purpose of indicating a transfer of title or for the purpose of showing that the contractor has complied with the Manual requirement as to handling of property?

[fol. 288] A. In the case of representatives from my office they were performing checks which were in accordance with

the 910 Manual.

Q. But not to indicate transfer of title?

A. No. We never considered any property in the possession of Roane-Anderson Company other than Government property. To my knowledge, they do not have an item of personal property.

Re-direct examination.

By Mr. Fowler:

Q. The question of transfer of title never occurred to your mind?

A: As far as e are concerned, we were always agreed on that one point.

Re-cross-examination.

By Mr. Humphreys:

- Q. You are familiar with Article IX in the contract, are you not, or were you?
 - A. I have read it several times.
- Q. And you are aware that it provides that upon final-inspection the contractor shall be given notice of the acceptance or rejection, that is in regard to the title to property, that is the acceptance by the Contracting Officer. Do you say that there has been no practice established relative to that and none has existed since the beginning of this?

A. This is the written notice of acceptance?

Q. That is in regard to quality and auantity?

A. In Receiving Reports, all Receiving Reports were prepared every time shipment was received by Roane-Anderson Company, and this fellow signing each one under the conditions as outlined in this particular Audit Manual. The contractor is the Receiving Agent of the Govern-[fol. 289] ment.

Q. In your contemplation, the contractor is authorized as Receiving Agent to indicate his acceptance, not only on his behalf but on behalf of the United States Government?

A. He is the one

Q. That's what you have just said?

A. Yes, I think that's right.

Q. Where is there any authority written or otherwise for that conclusion?

A. I would say that it is more or less a carry-over from other previous contractors on the area, and that it was deemed adequate in that this was written notice by the contractor to the Contracting Officer.

Q. Do you have any written designation by the Contracting Officer of the contractor as agent for the acceptance of

the property and the transfer of title?

A. In all cases to Roane-Anderson Company.

Q. It happens in this case that there isn't any?

A. The reason for that-

Q. I say, it just happens in this case that there isn't any in Roane-Anderson?

A. As far as I enter into the picture. I would not say that there wasn't written notice before my time.

Redirect examination.

By Mr. Fowler:

Q. You remember that this contract expressly designates Roane-Anderson Company as agent of the United States for buying, and receiving and everything else in this work; do you remember that?

A. Yes.

[fol. 290] Re-cross-examination.

By Mr. Humphreys:

Q. What purpose do you serve if they are going to do it all?

A. Probably that is the reason they are fitting us out of the picture, but my job was only for accountability, to see that there was a Receiving Report prepared, that this material shown on the Receiving Report was posted to an account which was the Government's record with a signed issue slip authorized by Roane-Anderson Company people that they sign, taking credit to their account, and all these debits and credits had to be verified by us, and we were held responsible by the Audit Section for any discrepancy that existed.

Q. Were you ever employed in a similar capacity anywhere else before being employed here?

A. Yes.

Q. Whereabouts?

A. Do you mean as far as it pertains to this particular account?

Q. No, as far as pertains to Government possession in relation to property handled by a contractor?

A. I have been here since 1943 and I was at Baltimore before coming here, with the Ordnance Department.

Q. That's the Ordnance Department?

A. Yes.

Q. Where were you stationed?

A. Baltimore.

Q. Who were you employed by then?

A. The Ordnance Department.

Q. Heve you ever had the office of Property Accountability under any other contractor?

[fol. 291] A. I have only been an assistant to an Accountable Property Agent for some two years.

Further deponent saith not.

Dwight A. Smith, By A. C Dore, Court Reporter.

Sworn to before me 13 December, 1948, McNabb, Notary Public. My commission expires: ——,—.

[fol. 292] Deposition of J. P. Fulghum Filed July 1, 1949.

The next witness, J. P. Fulchum, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your name, age, address and occupation.

A. J. P. Fulghum. I am 37 and I am at the present time warehouseman or storekeeper and I live at 115 West Hunter Circle, Oak Ridge.

Q. Who is your employer?

A. AEC. Mr. Russell is my supervisor.

Q. How long have you held your present position?

A. About a month and a half, I would say.

Q. What were you doing before you took the present position?

A. I was Materials Inspector.

Q. Who was your employer then?

A. Mr. Charley Williams.

Q. Were you employed by the Atomic Energy Commission?

A. Yes.

Q. When were you employed by the Atomic Energy Commission as Materials Inspector?

A. In August, 1947, I believe.

Q. What were your duties as Materials Inspector? [fol. 293] A. Inspecting materials as they arrived at Roane-Anderson Company warehouse and along with one of Roane-Anderson Company's Materials Checkers, I checked this material on a spot-check basis, signed Roane-Anderson Company's Receiving Reports, their tally-in Re-

port and also made out a Receiving Report and forwarded it to the Atomic Energy Commission, Audit Section.

Q. I hand you Exhibits 12, 13, and 14 filed in this case and ask you if they bear your signature as a representative of the Atomic Energy Commission?

A. They do.

Q. Are these papers typical of receiving transactions?

A. Yes.

Q. What would you do upon the receipt of goods, Mr.

Fulghum?

A. Well, all of the goods, they would come to C-1 Warehouse loaded by truck, and we would take the shipping document, freight bill, as we call it, and check the number of packages, boxes or what have you against the number listed on the freight bill to see if they were all there. I did not sign the freight bill, but Roane-Anderson Company's representative did sign the freight bill. Shipments are placed in the warehouse, and Roane-Anderson Company's checker got their purchase order and any documents concerning the shipment and we opened the shipment, inspected it for quantity and quality and checked it against the purchase order specifications.

Q. Now, these sheets which we have referred to as Exhibits 12, 13, and 14, when were they prepared and signed by you with respect to the time at which the goods came in? [fol. 294] A. Well, there here are made out by Roane-

Anderson Company's Inspector or Materials man.

Q. You are referring to the tally-in sheet?

A. No. 86942. This is my inspection sheet here and it was made out at the same time we checked the material. It was forwarded to the Atomic Energy Commission, Audit Section.

Q. You have just been referring to "Materials Check Sheet"?

A. That's right.

Q. And both the tally-in sheet and Materials Check Sheet were made when the goods were first opened and inspected?

A. That's right.

Q. Then with respect to the Receiving, Inspection and

Acceptance Report, what is it?

A. It is a copy of this tally-in sheet that was made out when the goods were received, and this went on into Mr. Tom Mee's office and was typewritten out.

Q. It is just putting the same thing in more formal style?

A. Yes, you have to have so many more copies of this for different offices.

Q. Has there been any change in this inspection pro-

cedure of the Atomic Energy Commission?

A. I have been transferred from there down to the Surplus Property Division and to the best of my knowledge there is no one down there doing this inspection at the present time.

Q. The contractor, Roane-Anderson Company's inspec-

tors are still on the job?

A. As far as I know, yes.

Q. When was the Government label or brand put on these

[fol. 295] things after they came in?

A. Well, they were put on them right at the time they were opened, the Property Section notified and they came up and stenciled them, and painted the number on them.

Q. Did they prt "U. S.-RA" on them?

A. Yes, on some they put "U. S. RA" and put a number on there.

Q. This procedure that you have described, is that followed regardless of whether the goods come in from outside of Tennessee or some other point within Tennessee?

A. As far as I know, it did not matter where they came

from.

Q. And so far as you know, the procedures you have described have been followed uniformly?

A. Yes.

Q. And will continue to be followed uniformly except that the Atomic Energy Commission apparently is not making any spot checks any more?

A. That's right.

Cross-examination.

By Mr Humphreys:

Q. Now this contract between Roane-Anderson Company and the Atomic Energy Commission contains an Article IX. Are you familiar with that Article IX?

A. No, I am not.

Q. Article IX reads:

"Title to all materials, tools, machinery, equipment and supplies which the contractor purchases in ac-[fol. 296] cordance with Article I of this contract and MARKELLER

for which the contractor shall be entitled to reimbursement under Article V, shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment, and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further, that upon such final inspection, the contractor shall be given written notice of acceptance or rejection as the case may be."

Since you do not even know of the existence of that Article, I take it you don't understand that your duties were in relation to the Article?

A. I understand my duties. Mr. Williams took me down and showed me what to do, told me the reports to make out, described how he wanted the check done on the materials that came in, and any discrepancies that I noted were reported to Williams.

Q. A quantity and quality check?
A. And damage, or what have you.

And further deponent saith not.

J. P. Fulghum, by A. C. Dore, Court Reporter.

Sworn to before me 13 December, 1948. McNabb, Notary Public. My commission expires:——.

[fol. 297] Deposition of Louis M. Groeniger Filed July 1, 1949. In the Above Styled Causes Was Resumed at Oak Ridge, Tennessee on April 4, 1949 at 10 o'Clock A. M., and Continued by the Taking of the Depositions of Louis M. Groeniger, R. J. Rochstroh, Samuel R. Sapirie

These further depositions are taken under the same agreement as stated at the time of the taking of the first depositions beginning December 13, 1948.

Solicit or for the defendant waives the disqualification of A. C. Dore, Court Reporter to swear the witnesses, such disqualification arising because Mr. Dore is a notary public for Knox County, Tennessee and not for Anderson County, Tennessee, and it is agreed that Mr. Dore may

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swear the witnesses, sign their names hereto and in all respects serve as if a notary public for Anderson County, Tennessee.

Louis M. Groeniger, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your full name, age and address.

A. Louis M. Groeniger, 118 Meadow Road, Oak Ridge, Tennessee; 37.

Q. What is your occupation!

A. Chief of the Industrial Personnel Branch of the Oak Ridge operations, Office Division of Organization and Personnel.

[fol. 298] Q. Is that a part of the work of the Atomic Energy Commission?

A. Yes.

Q. You are an employee of the Atomic Energy Commission?

A. Yes. 4

Q. How long have you held the position stated?

A. Since March 22nd, 1948.

Q. What are the duties of that position?

A. To supervise the work done in a section known as Wage and Salary Administration Section which explores and either approves or disapproves contracts' policies for reimbursement of moneys expended on employees. I mean, specifically, that any expenditure of the contractor whichhas to do with salaries or wages and any other conditions of employment that affect the employees are part of the purview of this Wage and Salary Administration. Other duties as Chief of the Industrial Personnel Branch has to do with advising the manager of the Oak Ridge operations through my immediate chief, Mr. Jack Curtis, on matters pertaining to labor relations. Another duty is supervision of a Personnel Statistic Branch which is concerned not only with wages and salaries and the statistical side of employment at Oak Ridge but has to do with such things as cost of living. Those three sections come under my branch, wages, labor relations and personnel statistics.

Q. What position did you hold immediately prior to March, 1948?

A. From May 5th, 1947 until March, 1948 I was chief of a section which included the Wage and Salary Administra-[fol. 299] tien and the labor relations. The only difference is I did not have this personnel statistics function.

Q. Prior to May 5th, 1947 what was your occupation?

A. From January 1st, 1946 until May 5th, 1947 I was employed as a civil examiner by the National Labor Relations Board working out of the Tenth Regional Office situated in Atlanta. I had a territory which was comprised of East Tennessee.

Q. Where were your headquarters?

A. My official headquarters were in Atlanta. I spent upwards of twenty days a month in East Tennessee, ranging from Bristol and Kingsport down as far as Oak Ridge.

Q. How much time would you spend on duties relating

to Oak Ridge!

A. Well, from about July 1946 forward, I spent about 50 per cent of my time at Oak Ridge. As a matter of fact, in February, 1946 while I was still employed by the N. L. R. B., I was assigned a house here at Oak Ridge and moved my family here.

Q. You were not an employee of the Manhattan Engineering District at the time of the execution of the contracts filed as exhibits in this case, entered into with Roane-Anderson Company and Carbide & Carbon Chemicals Corporation?

A. No.

Q. I believe that the Atomic Energy Commission assumed jurisdiction over Oak Ridge, January 1st, 1947!

A. That's right; at least, that's my understanding.

Q. And you were not employed by the Atomic Energy Commission until May 5th, 1947?

[fol. 300] A. That's right.

Q. From your actions in discharge of your official duties have you ascertained whether or not the Atomic Energy Commission when it assumed jurisdiction over Oak Ridge, undertook to draw together into one formal statement various provisions that had theretofore been published regulations of labor relations between employees and the contractors?

A. Yes. Under the Manhattan District, the basic contracts such as are exhibits in this matter contain general

clauses stating that the contractor would be reimbursed for moneys expended on employment and everything incident thereto so long as the expenditure was covered by the specific approval of some officer of the Manhattan District. That officer was referred to as the Contracting Officer. During the three or four years of operation the authorizations for reimbursement were in various forms. Some of these forms would be actual reimbursement authorizations based on the decisions of the Wage and Salary Administration Agency of the Government. I believe the correct title was Wage Administration Agency. It might have been Salary Stabilization Agency. Some of the authorizations would be in the form of memoranda of clarification for the contractor from the Contracting Officer or possibly the memoranda would be from some higher up in the Manhattan District than a Contracting Officer. In any event, the Atomic Energy Commission must have recognized that after several years of accumulation of all these various forms of authorization [fol. 301] there was need for a regularized system, and as of January 1st, 1947 each contract then in existence was examined carefully by employees of the Wage Administration Section and a document such as introduced in this evidence, Reimbursement Order No. I for Roane-Anderson Company and Carbide & Carbon was the result. This is Reimbursement Order No. 1.

Q. In order to be more specific, I hand you now a mimeograph document styled, "United States Atomic Energy Commission. Reimbursement Order," consisting of 23 pages with six attachments thereto bearing on the 21st page of the Reimbursement Order the signature of Jack Curtis and ask you if this is the Reimbursement Order to which you refer in the case of Carbide & Carbon Chemicals Corporation?

A. Yes, in the upper righthand corner I notice this No. 1.

Q. I next hand you a document similarly styled except that it relates to Roane Anderson Company rather than Carbide & Carbon Chemicals Corporation and which consists of 32 pages and bearing on the last page the signature of Jack Curtis and ask you if this is the Reimbursement Order in the Roane-Anderson Company case?

A. Yes.

Q. Are those correct copies of the Reimbursement Orders with those contractors?

A. Yes.

Q. I will ask you to file in the Roane-Anderson cases the Reimbursement Order affecting the Roane-Anderson Company as Exhibit No. 27.

A. Yes, I so file it.

Q. I ask you to file that Reimbursement Order affecting [fol. 302] Carbide & Carbon Chemicals Corporation as Exhibit No. 19 in the Carbide & Carbon cases?

A. Yes.

Q. For the convenience of counsel and the Court, would you summarize the general subject matter and indicate the extent of detail of these Reimbursement Orders without

going to the extreme of a detailed statement?

A. The Disbursement Orders cover such matters as the salaries or wages paid by the contractors to the employees engaged in the work specified in these contracts. The Reimbursement Orders define the limits by which an employee may receive pay increases. They control the payment for overtime in some cases, the Reimbursement Order will control the amount of overtime which may be worked and in any event they always control the amount of compensation the employee will receive for overtime work. They spell out how much vacation pay the employees may receive. They set forth which holidays the employees may be paid for not working. They define how much absent time an employee may be paid for including absences because of sickness or in some rare cases for personal reasons. They cover reimhursement for subsistence and travel, expenses for moving, expense to employees who are brought to the project for the convenience of the Government; in some cases they provide for the return expenses. When an employee has completed his job, he is sometimes entitled to reimbursement for moving himself and family and household goods back to the point of origin. The Reimbursement Order also con-[fol. 303] trols the expenditure the contractor may make on health and accident insurance, retirement plan, recreation provided for employees, termination pay, and while it is not in either of these two, occasionally on a construction contract there will be spelled out what the craftsman may receive in the way of travel pay.

Q. If in some instance the contractor should fail to comply with this Reimbursement Order, how is the contractor penalized?

A. Well, let's take a concrete example on that. In the Carbide & Carbon Reimbursement Order in attachment No. 3, page 3 of 4, the first classification listed there is a maintenance craft supervisor. It provides that the monthly salary for that man can be anywhere from \$395.60 to \$485.00 per month. If the contractor wishes to pay a certain craft supervisor more than \$485.00, and we did not approve it, he could either pay it out of his own pocket or just pay this maximum, which we would approve the maximum of \$485.00.

Q. In other words, departure from the limits of the Reimbursement Order is at the cost of the contractor himself?

A. That's right. Another more general example would be if he negotiated a contract with a labor union providing for ten cents an hour wage increase and when he presented that to us, we said that there was no justification for the ten cents and that five cents was all he should have negotiated for, he would have had the alternative of going back to the labor union and telling them that five cents was all that he [fol. 304] would give them or by paying the additional five cents out of his own pocket.

Q. The Reimbursement Order in both cases, that is, Roane-Anderson Company and Carbide and Carbon both were prepared under the specific authorization of certain provisions of the contract entered into by the Atomic

Energy Commission with those contractors?

A. That's right. That is the general clause I referred to earlier in each definitive document.

Q. Has it been found necessary from time to time to make changes in the Reimbursement Orders!

A. Yer.

Q. About how many such changes have been made? 49

A. I think there are a little more than fifty supplementary Reimbursement Orders in the Carbide & Carbon contract and a few less than fifty in the Roane-Arderson contract.

Q. Have those changes affected the general structure and scope of the original Reimbursement Order filed as an exhibit here!

A. No.

Q. Of what then is the nature of the changes?

A. Well, in the Roane-Anderson Company pay structure for its maintenance employees was there effected by a union negotiation which was concluded shortly after the first of the year, 1947. This document R. O. 1 provided that a plumber as of January 1st, 1947 could be reimbursed for \$1.44 an hour. If memory does not fail me, in late January, [fol. 305] 1947 Roane-Anderson Company and the Knox ville Building Trades Council reached an agreement which provided that that plumber should receive \$1.54 per hour. Most of the rates shown on pages 29, 30, 31 and 32 of R. O. 1 in the case of Roane-Anderson were effected by that negotiation, so we see it when the contractor presented a request for change in the Reimbursement Order, I believe, No. 3, 2 or 3, revising the rate. From time to time there have been other revisions, but there has been no revision in the policy, procedure and methods of handling this.

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Q. There has never been any abdication by the Atomic Energy Commission of the power to impose these rates.

apon the contractor?

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A. No, there is a modification of the Roane-Anderson Company contract which I might quote to demonstrate that. The Roane-Anderson Company contract was modified by Modification No. 14 on the 27th of June, 1947 and this modification became effective July 1st, 1947. Article XXX of that modification says in part:

"Any amount paid or allowance made by the contractor to any employee in excess of regulations governing the hours of work and pay, job classifications and employee policy so approved or ratified by the Contracting Officer shall/be at the expense of the contractor under any pay reimbursement by the Government unless and until the Contracting Officer has so approved and ratified in writing."

In the same Article XXX of the modification there is further demonstration, which I don't believe it is necessary to quote.

[fol. 306] Q. The contract at one point authorizes the Atomic Energy Commission to direct the contractor to discharge any pay employees that the Commission decides ought to be fired. Has the Atomic Energy Commission ever exercised that power?

MA. Yes.

Q. In more than one instance?

A. I know of only two cases. I think there has been more persons released by the contractor at the Commission's indication rather than order but I know of two instances where it was ordered.

Q. In other words there has been actual instances of the exercise of that power by the Commission?

A. Yes.

Q. Mr. Groeniger, with respect to the higher salaried employees of the contractor, whom we may refer to as key personnel, does the Atomic Energy Commission have and exercise power with respect to the amounts of their salary and otherwise?

A. Yes, not only the amount of the salaries, but the Commission has the authority to exercise judgment as to whether or not the employee is qualified. Now, that is stated differently in different contracts, and for example, I think in the Carbide & Carbon document it says the Commission must have prior review of the qualifications and it names such qualifications of key personnel.

Q. And furthermore says their principal assistants?

A. In the matter of salaries no contractor can hire anyone in excess of \$8,000.00 per year without Commission approval.

[fol. 307] Q. Can we indicate what basic factors made it necessary for the Atomic Energy Commission to retain this particular control over the employment and work and

compensation of personnel of a contractor!

A. The Atomic Energy Commission is an arm of the Executive Branch of the Federal Government and it does not have the authority to delegate its responsibility for the expenditure of the taxpayer's dollar.

Q. So it has to be careful in these cost-plus situations?

A. Yes.

Q. Is there also some elements of maintenance of secrecy and to employ only reliable personnel at this particular place here?

A. Oh, yes.

Q. Have you regarded that as perhaps one of the import-

ant reasons contributing to this personnel policy?

A. No. My answer is along a fiscal and financial line rather than the security of information and the desirability of the employee as a loyal American. My answer is based on the responsibility to the taxpayer through the Congress. I don't know of anything in the Atomic Energy Act or any other Act of Congress which could permit a government agency to tell a contractor to pay whatever wages it fikes to meet different kinds of situations and that it will reimburse him later for it.

[fol. 308] Cross-examination.

By Mr. Humphreys:

Q. It is customary, as I understand it, in a cost-plus-a-fixed-fee contract to fix limits of maximum liability of the employing government pency for the employment policies of the contractor. That's true, isn't it?

A. To the best of my knowledge.

Q. What you are testifying in regard to here is in substance that representing the government agency you have established through these documents that you have filed the maximum limits of Government liability for employment policies of the contractors, and these represent the maximum limits except as they have been modified by modification orders referred to; is that true?

A. That is true. That suggest this to me: I believe there is a provision in the contract—I know there is—that if the contractor said, "Well, we can afford to pay more than this and we are going to do it," and the contractor consistently

persisted in that we could can-el the contract.

Q. But, after all, his employment—subject to the extent that it is necessary to maintain a personnel that is not subversive and is toyal—his employment policies are under his own control except as regards maximum limits of liability which are fixed in these orders.

A. As far as reimbursability, it is, yes.

Q. And that is what you are testifying in regard to?

A. Yes.

Re-direct examination.

By Mr. Fowler:

[fol. 309] Q. Did the contents of these Reimbursement Orders originate with the contractors or with the Atomic Energy Commission or before that with the Manhattan District?

A. Both.

Q. Will you explain?

A. Yes. It is the Commission's policy, internal policy, that insofar as a contractor has home office policies which he has utilized in his private operations, we will approve those unless and until they upset something at Oak Ridge. For example, as I understand this history of employment

policies at Oak Ridge, certain Carbide & Carbon policies that they had practiced in private operations would probably not have been feasible here. The Manhattan District, therefore—I don't know whether they expressly disapproved or tacitly disapproved those policies—maybe Carbide & Carbon never requested that they be put into effect. Other policies would just have no application:

Q. To the extent that the Atomic Energy Commission found and finds contractor policies unobjectionable, the Commission adopts them as its own and embodies them in

Reimbursement Orders?

A. Yes, except that that is not known as the Atomic Energy Commission's own policies. It is policies which the contractor is allowed to use in the exercise of the particular contract. But it does not become the policy of the Atomic Energy Commission. If I might add this, I might have gone a step further in replying to your question about maximum liability. In certain phases, for example, on a construction [fol. 310] contract, by law there is a minimum which the contractor must follow. That is provided for in the Davis-Bacon Act.

Mr. Humphreys: That is an Act of Congress? The Witness: Yes.

Q. By saying that the Commission adopted these policies as its own are simply meant that where unobjectionable, the Commission would put in effect by its Disbursement Order the policies suggested by the contractor?

A. That's right.

Re-cross-examination.

By Mr. Humphreys:

Q. Actually, the sum and substance of the whole matter is that you reimbursed the contractor for his expenditures under these policies which you permit him to adopt. That's the sum and substance of the matter?

A. Yes.

Q. That gets it down to the point?

A. Yes.

Q. You reimburse him to the maximum limit you have indicated?

A. Yes.

Q. But he adopts the policies and you reimburse him unless you disapprove the policy as calling for the expenditure of more money than you feel he should be authorized to expend. That, in substance, without being specific, would be correct?

A. Except that I would like to retain that one point, that [fol. 311] he may have a policy which he wants. As a matter of fact, I have written two letters last week refusing to approve policies which he has contended and demonstrated our policies he practices elsewhere.

Q. But they don't fit in here and so they are not allowed?

A. That's right.

And further deponent saith not.

Louis M. Groeniger, By A. C. Dore, Court Reporter.

Sworn to before me this April 4, 1949. A. C. Dore, Notary Public. My commission expires: 4-14-52. (Seal.)

Deposition of Samuel R. Savirie Filed July 1, 1949

The next witness, Samuel R. Sapirie, being first duly sworn, deposed as follows on:

Direct-examination.

By Mr. Fowler:

Q. State your name, age and address.

A. Age 39, 100 Ogden Circle, Oak Ridge.

Q. What is your occupation?

A. I am engineer with the Atomic Energy Commission.

Q. What position do you hold with the Atomic Energy Commission?

[fel. 312] A. I am Director of Production and Engineering for Oak Ridge operations.

Q. How long have you held that position?

A. I have held that position since February 1st, 1947.

Q. What are the duties of that position?

A. I am responsible for developing, recommending and directing procurements for production and process improvement of the electro-magnetic and gaseous diffusions separation plants, engineering and construction related to pro-

duction and research procurements, and accountability of source and fissionable materials, developing and currently maintaining plans for mobilization, supplying natural gas and electric power, communications service, off-area facilities not otherwise assigned, and for providing staff assistants on similar matters pertaining to the Dayton Area.

Q. Mr. Sapirie, first I want to ask you about who buys and pays for the services of the utilities to the contractors?

A. I might list those individually. The electric power service is purchased by the Atomic Energy Commission under a prime contract between the Commission and the Tennessee Valley Authority. The telephone services are purchased by the Commission under a prime contract with Southern Bell Telephone & Telegraph Company. The water is supplied with the use of Government-ewned facilities that have been constructed on the area and are now operated by various contractors under cost-plus-a-fixed-fee-type contract. The Roane-Anderson Company operates the main water system which supplies the City of Oak Ridge, and [fol. 313] electro-magnetic plant, and the Oak Ridge National Laboratory. The Carbide & Carbon Chemicals Corporation operates the water system that supplies the gaseous diffusion plant. The Roane-Anderson Company also operates the two sewage systems that provide for sewage disposal for the Town of Oak Ridge. The Carbide & Carbon Chemicals Corporation operates the sewage disposal plant at the three plants.

Q. Has the Atomic Energy Commission entered into a contract looking to the supplying of natural gas to one or

more of the plants at Oak Ridge?

A. Yes, the Atomic Energy Commission has entered into a prime government contract with the East Tennessee Natural Gas Company for the supplying of natural gas to serve the production plants and possibly the City of Oak Ridge. The Gas Company is at present applying for a Certificate of Convenience and Necessity from the Federal Power Commission, after which they will initiate construction of the pipeline from a point on the T. G. T. line near Smithville, Tennessee to Oak Ridge with use of steel pipe that is being made available under the steel industries' voluntary allocation plan. The gas will then be supplied to the Oak Ridge area for the use of the three plants and possibly the city.

Q. Leaving the general subject of the services furnished

by utilities, in the case of some supplies used by these contractors, does the Government through the Atomic Energy Commission buy them itself and turn them over to the contractors?

A. There are some supplies such as nitrogen, helium and certain coded chemicals that are purchased by the Govern-[foh 314] ment under Government purchase orders for delivery to the plants for use in the plant operation.

Q. How about automotive equipment?

A. Automotive equipment and office equipment is purchased by the Government for use by the operating contractor.

Q. Is the distribution of steel still subject to some alloca-

tion by somebody?

A. The Steel Industries Committee is cooperating with certain Government agencies under a voluntary steel allocation system whereby they make certain quotas of steel. available for use during different quarters of the year. The Atomic Energy Commission is participating in the voluntary plan and thereby secures steel allocation that is then used by the various operating contractors for construction and operation under cost-plus-a-fixed-fee-type contracts.

Q. Now, Mr. Sapirie, going to the subject of source and fissionable material, which was referred to in the Atomic Energy Act, I want to ask you to tell us or describe to us the extent of supervision by the Atomic Energy Commission

a over the contractors who deal with these materials?

A. Well, in the first place, I might say that title to the source and fissionable materials remains with the Atomic Energy Commission. The materials are made available to the various contractors by the Commission and are carefully accounted for and controlled with use of a system of receipts, inventory and survey. The Commission uses complicated statistical analysis method to analyze the disorepancies in order to ensure against diversion of the source [fol. 315] and fissionable material. The analyses and protective measures used by the contractors are under surveillance of Commission representatives periodically and surveys of the security and accountability procedures employed by the contractors are made in accordance with well-defined Commission policy.

Q. I hand you a bulletin apparently published by the Atomic Energy Commission and ask you to tell me what

that is?

A. This is bulletin G. M. 95 and summarizes the Atomic Energy Commission's policy that is followed in the accounting for source and fissionable material. Its policy is defined in Washington, is transmitted to the five field offices of operation, of which Oak Ridge is one, where it is then disseminated to the field offices under Oak Ridge, with implementation in an Oak Ridge bulletin No. 96.

Q. Will you file Bulletin G. M. 95 as Exhibit No. 20 in the Carbide & Carbon Chemicals Corporation cases and also file Bulletin O. R. 96 as Exhibit No. 21 in the Carbide &

Carbon cases.

A. Yes, I so file them.

Mr. Fowler: I state now that these bulletins are not filed in the Roane-Anderson Company cases because Roane-Anderson does not have a direct relation to the handling of source and fissionable materials.

Q. Had you completed your statement with respect to these two exhibits?

[fol. 316] A. I might add briefly that G. M. 95 contains a copy of the shipping document that is used in transferring source and fissionable material between contractors and the Atomic Energy Commission's Offices.

Q. What page is that one?

A. That is Exhibit 2 at the back of the bulletin.

Q. Next to the last page?

A. Next to the last page. In the back of that form it illustrates the routing of the yanious copies of the S. F. shipping form. You will note that each form has copies that go to each Atomic Energy Commission office, involved in the shipment, both the shipper and the receiver, and regardless of what action is taken by the contractor in shipping source and fissionable material, you will find that the action of shipment is directed by the Atomic Energy Commission and then the completed shipping forms are filed in the Atomic Energy Commission offices that have responsibility for receiving.

Q. When you speak of S. F. materials, you are referring

to source and fissionable material?

A. That is right. Source material is material that contains normal uranium. Fissionable material is enhanced in the uranium 235 isotope of plutonium.

Q. Does the Atomic Energy Commission exercise any supervision during the processing of these materials?

A. Yes, the actual operations are carried on by the costplus-fixed-fee operating contractors. However, they carry on the operations in accordance with specific policies and [fol. 317] schedules and specifications established by the Commission, and in accordance with budgets that are approved by the Commission with use of funds allocated and authorized by Congress. The Atomic Energy Commission operations offices has a production division under my office that is a plant operating groups, that extends the charges, approving their time, inspecting the work being done by the operating contractor and checking and analyzing all operating reports prepared by such contractor.

Cross-examination.

By Mr. Humphreys:

Q. After the purchase of the utilities services, electricity and water, by the Atomic Entroy Commission on prime contracts on what basis are these utilities furnished to the prime contractors, who are operating the plant here?

A. They are furnished to the plant operators under an arrangement whereby the Electric Power branch under, the Engineering Division takes the responsibility for checking and billing from Tennessee Valley Authority and the allocation of the use of power under such billing to the various operations for cost purposes. However, there is no exchange of funds between the parious contractors and the Commission for the power so furnished. We have a telemetering system that summarizes the total usage in the area, which is the basis for a single bill that is presented by Tennessee Valley Authority to the Commission and paid by a single check. The budgeting for the Tennessee Valley Authority account is handled under my offices and the operating contractors have not participation in the actual funding of the power bill. They are advised, however, of the [fol. 318] value of the power furnished to them so that their records of the cost of production or the cost of operating the town are realistic and include all values.

Q. As a matter of fact, there has been and there is but one major source of electric energy in this whole area and

that is the Tennessee Valley Authority?

A. With one exception. We have at K-25 a generating station of our own that produces a particular type of power for our operations.

Q. Who operates that?

A. That is operated by Carbide & Carbon Chemicals Corporation in accordance with operating procedures that have been developed and approved by the Commission on an entirely reimbursable basis.

Q. I believe that is a very large plant and it has an enor-

mous capacity for the creation of electric energy?

A. This plant has an installed capacity of approximately two-thirds of that capacity.

Q. Now, you spoke, of direct purchases by the Government of coded chemicals and steel?

A. I did not mention steel. I included nitrogen, helium,

and certain other products.

Q. I believe that this purchase by the Government of these particularly-mentioned items is made necessary by the fact that they are controlled; isn't that true?

A. No, not entirely. We sometimes make purchases for the contractors when we can buy a little cheaper than they can. There are some firms that will give the Government [fol. 319] 15, 20 or 25 percent discount that object to giving it topour contractors direct, in which cases we then have to write to the contractors and write to the manufacturers and explain the type of arrangement we have, in which case they give our operating contractors the same discount that they give us.

Q. Now, when you buy those supplies direct, that is, when the United States or the Atomic Energy Commission buy them direct, there is no sales or use tax paid on those purchases by the Atomic Energy Commission, is there, or do you know?

A. I don't know.

Mr. Fowler: It is our information that in no case of direct purchase of materials or equipment or property by the United States Government or the Atomic Energy Commission is any sales or use tax paid to the State of Tennessee.

The witness: I might quote for you the type of answer we give various companies who sometimes question the granting to one of our contractors of the same discount they give the Government.

Q. I appreciate your offer, but I don't think it is necessary.

Redirect examination.

By Mr. Fowler:

Q. There is just one simple matter which I want to clear up. I understand that there is some change currently being [fol. 320] made in the method of handling the telephone service, that is, whereas heretofore the Atomic Energy Commission has paid the Southern Bell Telephone Company directly for all services rendered, that some change is contemplated whereby the contractor will pay directly for

a part of the service?

A. That is in accordance with a policy that applies to all of our operations of trying to assign to the operating contractors all operating functions. Now we are endeavoring to transfer to our operating contractors the operation of the telephones which were facilities of the area. complishing that, we find that we might be able to secure better service and somewhat more economically by having most of the cost-plus-fixed-fee contractors enter into independent arrangements with Southern Bell Telephone Company for their own services. The contractors operating under the Office of Community Affairs will probably enter into their own negotiations with Southern Bell Telephone & Telegraph Company. The plant operating contractors, that is, Carbide & Carbon Chemicals Corporation will probably continue to take service from Southern Bell Telephone & Telegraph Company jointly with the Atomic Energy Commission, but will probably take over the operation of the switchboard which we now operate.

Recross-examination.

By Mr. Humphreys:

Q. I take it that the situation is, summarizing briefly, from what you say along this line, that when the Atomic [fol. 321] Energy Commission took over from the United States Army Engineers, it found a situation where the United States Army Engineers were engaged in a number of operations that could be handled by contractors, and in keeping with the Atomic Energy Commission's policy of having all of the operations handled by contractors as much as this can be done in keeping with the situation, you are turning over those services to the contractors?

A. That's right. That is reflected by the large reduction in the number of direct Government employees at Oak Ridge. We now have approximately 60 per cent of the number of people we had at the time the Commission took

Q. Is it the policy and the purpose of the Commission to ultimately have all of the services discharged by contractors except as regards the policy of maintaining a

surveillance for preservation of secrecy?

A. Not quite. The policy is to turn over to the operating contractors practically all of the direct operations. We do retain all policy-making and control functions. We retain. certain of the security functions that you mentioned, such as shipment security and the patrol of the area as a whole. We retain control over source and fissionable material. We retain budgetary control and we retain overall direction and administrative control. At the present time, we have also some other direct operations which we hope to get out of ultimately. We are still operating the communications, including both telephone and teletype. We will probably always have to retain a part of the teletype operations, [fol. 322] which includes a cryptographic system for the transmittal of classified messages. We are now doing some work on the disposal of excess and su-plus Governmentowned materials that have accumulated during the construction and operating program which we hope ultimately to turn over to the operating contractor as soon as some of the details can be worked out.

And further deponent saith not.

Samuel R. Sapirie, by A. C. Dore, Court Reporter.

Sworn to before me this 4 April, 1949. A. C. Dore, Notary Public. My commission expires 4-14-52. (Seal.)

[fol. 323], Deposition of R. J. Rochstroh, Filed July 1, 1949

The witness, R. J. Rochstron, being daly sworn, deposed as follows:

By Mr. Fowler:

Q. Give your full name?

A. R. J. Rochstrob.

Q. Mr. Rochstroh, state your age and address.

A. 57, address Room 146 Cambridge Hall, Oak Ridge, Tennessee.

Q. What is your occupation?

A. Traffic manager of the United States Atomic Energy Commission, Oak Ridge.

Q. What are the duties of your position?

A. Handling all matters pertaining to freight and passenger and air travel and all motor freight and express shipments.

. Q. How long have you held that position?

A. From December 1st, 1942.

Q. I take it, then, you were in the employ of the Manhattan District?

A. Yes.

Q. Before the Atomic Energy Commission took over?

A. Yes, in the Corps of Engineers.

Q. The principal thing I want to ask you about, Mr. Rochstroh, concerns the use of the Government bill of lading in transporting purchases to Oak Ridge, particularly purchases made by contractors at Oak Ridge. Can you tell [fol. 324] us in brief whether or not such shipments have been made on Government bills of lading and if the practice was terminated here?

A. Shipments were made from the vendors on Government bills of lading off and on. Sometimes, we would furnish a Government bill of lading with the purchase order. We discontinued that for the reason that so many of the original documents would become lost. Shipments would come in collect, freight charges collect and we would convert to a Government bill of lading at destination. That was really compulsory at the start due to the ráilroads having land grant rates with the Government.

Q. Now, by the phrase "at the start", what do you mean?

A. At the start of the job here, this job.

Q. That was in 1942 under the Manhattan District?

A. Yes.

Q. So, am I to understand that you are saying that from December, 1942 that it was compulsory to convert commercial bills of lading to Government bills of lading at destination?

A. Yes.

Q. Now, how long was that practice continued?

A. Up until May 12, 1948.

Q. Now, did the Government through that process of . conversion get cheaper land grant rates?

A. Yes, up to October, 1946.

Q. And we all understand that land grant rates are cheaper than the ordinary commercial rates growing out of some relation of the Government to the land granted to the [fol. 325] railroads?

A. Correct.

Q. Now, you say that in October, 1946 the Government ceased to derive any benefit from land grant rates?

A. They did, by an Act of Congress abolishing land grant

rates, the 79th Congress.

Q. Do I understand that there are no longer any land grant rates anywhere in the United States?

A. So far as I know, there is none.

Q. When it became apparent in that way in October, 1946 that there was no longer any saving in transportation expenses to be effected by the use of Government bills of lading or the conversion to Government bills of lading, what became the practice from October, 1946?

A. We continued to convert.

Q. Why?

A. Well, it was a procedure with the contractors or the purchaser, whoever bought the material,

Q. You continued the same procedure?

A. Yes.

Q. Was it mandatory or optional after October, 1946?

A. Optional.

Q. Can you say whether or not most commercial bills of lading were converted or not?

A. I would say from that period on, most of them were because most of the materials we were receiving at that time-were on Government procurement orders or contracts.

Q. Now, in the case of procurements in the order of Car-[fol. 326] bide & Carbon Chemicals Corporation beginning in October, 1946 were most of them converted or not?

· Acon certain commodities, yes. Minor shipments were

not converted.

Q. How about Roane-Anderson Company?

A. We converted practically everything for Roane-Anderson Company.

Q. Now, you have mentioned May, 1948. What happened

A. It was the change of policy between the Division of Finance of the Atomic Energy Commission and Carbide & Carbon Chemicals Corporation.

Q. What was the change?

A. Authorizing Carbide & Carbon to pay all freight charges.

Q. They did it with the purpose of converting to Govern-

ment bills of lading?

A. Yes. Let me clear that up: except where it is ona Government purchase order or contract, it is still compulsory to convert.

Q. Even though there is no saving?

A. Yes.

- Q. In the interim period from October, 1946 to May, 1948, the conversion to Government bill of lading did effect an avoidance of the three per cent Federal transportation tax?
 - A. That is correct.
- Q. Taking the period prior to October, 1946, you have said that conversion of the bill of lading was mandatory; is that correct?

[fol. 327] A. Yes.

Q. Was that true, regardless whether or not shipment was F.O.B. the vendor or F.O.B. destination?

A. It didn't make any difference.

Q. Now, with particular reference to the cases here involved, Carbide & Carbon Chemicals Corporation, I have certain papers I want you to examine and file. Now, for the purpose of illustrating this conversion process and in order that the record may contain a more complete description of the method of handling procurements, I am going to hand you photostatic copy of the following papers: First, a bill of lading on a printed form printed apparently by the Tennessee Railroad Company, dated at Rosedale, Tennessee, November 4, 1947 from Diamond Coal Mining Company relating to car No. 284291. I ask you to identify and file that as Exhibit No. 22 in the Carbide & Carbon case.

A. I so file it.

Q. I believe that the next step in the actual handling of the shipment would be the preparation of the freight bill by the Southern Railway Company with which railroad

the Tennessee Railroad Company connects at Oneida; is

A. That's correct.

Q. I therefore hand you freight bill of Southern Railway Company dated November 7, 1947 bearing No. 20288 relating to Southern Railway car 284291 and ask you to identify and file that as Exhibit No. 23.

A. I so file.

Q. In the Carbide & Carbon cases. I hand you photo-[fol. 328] static copy of United States Government bill of lading No A. T. 17893 and ask you to identify and file that as Exhibit No. 24 in the Carbide & Carbon case.

A. I so file it.

Q. I notice, Mr. Rochstroh, that the Government bill of lading just filed covers not only Southern Railway Company car No. 284291 but also a number of other shipments from the Diamond Coal Mining Company. Does that indicate that the Government bill of lading was made to cover many of the commercial bills of lading?

A. It is mostly done to save clerical work.

Q. Now, finally, I hand you public voucher for transportation charges, that is a photostatic copy, No. 4015853 and ask you to identify and file that as Exhibit No. 25 in the Carbide & Carbon case?

A. I do so.

Q. Now, Mr. Rochstroh, was the same process used in the preparation of papers in the case of Roane-Anderson Company procurements as in the case of Carbide & Carbon Chemicals Corporation procurements that we have just described, namely, the issuance of a Government bill of lading?

A. Yes.

Q. And conversion and so forth?

A. Yes, I might explain something. This document prior to January 1st,—I am referring to the voucher Exhibit No. 25—prior to January 1st, 1947 all charges were paid, transportation charges were paid by the Finance Officer, United States Army, Washington, D. C. to the account of the Government until such time as the Atomic Energy Comfol. 3291 mission took control of Oak Ridge.

Q. That was prior to what date?

A. January 1st, 1947.

Q. Mr. Rochstroh, do the Government bills of lading look alike as far as the printed form is concerned and I particularly direct my question at the Government bills of lading used in the Roane-Anderson Company case; do they contain the same provisions on the front and back in the original printed form as the Government bill of lading which you have filed as Exhibit No. 24 in the Carbide & Carbon case?

A. Yes.

Q: I will therefore ask you to file as Exhibit No. 28 in the Roane-Anderson Company case a photostatic copy of the same paper that you filed as Exhibit No. 24 in the Carbide & Carbon case, being United States Government bill of lading No. A. T. 17893?

A. I do so.

Cross-examination.

By Mr. Humphreys:

A. Mr. Rochstroh, this process of conversion to a Government bill of lading, does it consist of taking from the ordinary bill of lading the car numbers, weights and charges and putting those one a Government bill of lading and paying it on that basis? Is that it?

A. No.

Q. What does it consist of?

A. Issuance of a Government bill of lading, attaching the commercial document, shipping document and copy of

the freight bill.

[fol. 330] Q. That, of course, all occurs, I take it, after the goods have been ordered and received and the original bill is turned into your office and then the conversion takes place; is that right?

A. Yes.

Q. So that if Carbide & Carbon Chemicals Corporation—just taking a typical case—if Carbide & Carbon ordered a carload of coal and it came out—we are speaking now of the time prior to May 12, 1948—and it came out and they received the coal and a bill of lading covering the freight charges came with it, they turn it into your office and you all put it on a Government bill of lading and pay it on the Government basis; is that right?

A. That's correct.

Q. Now, I believe you say that in October, 1946 the Congress abolished the land grant rate benefits?

A. That is correct.

Q. Now, I believe you say that in October, 1946 the Congress abolished the land grant rate benefits by an Act of-Congress and after that time it was optional whether you made conversion or not or whether you just went ahead and paid it on the original oill or convert it?

o A. We converted practically everything after May 12th, for the reason that we were saving the three per cent.

Q. Why did you stop converting on May 12th, 19487 A. That is a policy issued by the powers that be and Carbide & Carbon.

Q. Now, Carbide & Carbon makes the purchase and pays the bill of lading?

[fol. 331] A. That's correct.

Q. And, incidentally, pays the three per cent tax? A. That's right.

Q. In other words, when it buys a carload of coal now from the Diamond Coal Mining Company, it orders the coal, it comes out and it gets the bill of lading and pays the three per cent Federal tax on the transportation?

A. Yes, on the transportation.

Q. And that has applied to shipments since May 12th, I mean the shipments to Carbide & Carbon?

A. On their own purchases, that is correct.

Redirect examination.

By Mr. Fowler:

Q. In order to get out of the three per cent Federal transportation tax the shipment has to move on a United States Government bill of lading, is that correct?

A. No, it can be converted to a Government bill of lading. Q. Or has to be such as that conversion will take place?

A. Yes.

Q. And it is because no conversion is contemplated in the case of shipments on Carbide & Carbon's own order, that Carbide & Carbon goes ahead and pays the three per cent 'tax ?

A. The only exemption is given to the United States Government on the three per cent transportation tax.

Q. On its own bills of lading? A. Yes.

[fol. 332] Recross-examination.

By Mr. Humphreys:

Q. I believe you say that the Act only exempts the United States Government and that that is not considered as applying to purchases by Carbide & Carbon on its own billing originally; is that right?

A. If Carbide & Carbon pay the carrier by check they have to include the transportation charges or tax, rather, of

three per cent.

And further deponent saith not.

R. J. Rochstroh, By A. C. Dore, Court Reporter.

Sworn to before me this 4 April, 1949. A. C. Dore, Notary Public. My commission expires: 4-14-52. (Seal.)

[fol. 333]

STIPULATION OF FACTS

Mr. Fowler: It is stipulated between counsel for the parties in all four of the cases to which the testimony already taken relates as follows:

(1) That the attachment hereto marked No. 29 in the Roane Anderson Company cases and No. 26 in the Carbide & Carbon Chemicals Corporation cases is a photostatic copy of the regulations of the United States Atomic Energy Commission relating to control of source material to which the witness Charles Vanden Bulck referred on page 76 of his testimony, and that said exhibit may be received and considered as a part of the evidence.

(2) That the United States Government owns all of the land comprising the area known as the Clinton Engineer Works, including the town and townsite known as Oak

Ridge, Tennessee.

Have I correctly stated our understanding as to this stipulation?

Mr. Humphreys: Yes, I think I can make this stipulation in regard to what you have in mind to undertake to prove by Mr. Vanden Bulck.

It is stipulated that all of the buildings on the land comprising the area known as the Clinton Engineer Works, including the Town of Oak Ridge, were built for the Gov, ernment and belong to the Government and this stipulation is not to be considered as a stipulation on the part of the defendant that the materials and supplies from which these buildings from which these buildings were constructed were [fol. 334] the property of the Government before and at the time of incorporation into the buildings or were owned under such circumstances as to be exempt from sales or use tax liability, and our understanding is that we agree that this stipulation is not to be interpreted as being other than a fact bearing upon the issue, and does not stipulate the issue. Is that right, Mr. Fowler?

Mr. Fowler: That's right.

[fol. 335] In the Chancery Court at Nashville, Tennessee

No. 65015

ROANE-ANDERSON COMPANY

VS.

SAM K. CARSON, Commissioner of Finance and Taxation

and

No. 65164.

WILSON-WEESNER-WILKINSON CO., and ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation

STIPULATION AS TO EXHIBITS November 14, 1949

At the hearing of the above-styled causes before the Special Chancellor, it was stipulated by counsel with the approval of the Court, that the various supplements to the main contract between Roane-Anderson Company and the United States of America entered into since the date of Supplemental Agreement No. 18, dated July 6, 1948, which Supplemental Agreement No. 18 is already filed as Exhibit 2 in this cause, should be filed as further exhibits, and it was [fol. 336] also agreed with the approval of the Court that the record of the negotiations between Roane-Anderson

Gompany, or its parent corporation, and the United States Government, should also be filed as an exhibit. Pursuant to said agreement, the following further Supplemental Agreements and record of said negotiations shall be filed as exhibits in this cause bearing the indicated exhibit numbers:

Exhibit 30. Modification No. 19 dated October 1, 1948.

Exhibit 31. Letter dated March 11, 1949.

Exhibit 32. Modification No. 20 dated March 30, 1949.

Exhibit 33. Letter dated May 17, 1949.

Exhibit 34. Modification No. 21 dated June 17, 1949.

Exhibit 35. Letter dated June 23, 1949.

Exhibit 36. Form for negotiation for services of contractor on cost-plus-a-fixed-fee basis relating to the operation, supervision and maintenance of government facilities at Clinton Engineer Works and the Town of Oak Ridge, consisting of forty-four pages, 8 of which pages appear between numbered pages 21 and 22, and the 36th page appears as the last page, although numbered 21.

This October 22, 1949.

S. Frank Fowler, Solicitor for Complainants; Allison B. Humphreys, Jr., Solicitor for Defendant.

[fols. 337-339] Clerk's and Master's Certificate to foregoing transcript omitted in printing.

[fol. 340] IN THE SUPREME COURT OF THE STATE OF TENNESSEE

CARBIDE AND CARBON CHEMICAL CORPORATION

vs.

. Sam K. Carson, Commissioner of Finance & Taxation

. ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON CHEMICAL CORPORATION

VS.

Sam K. Carson, Commissioner of Finance & Taxation

WILSON-WEESNER-WILKINSON and ROANE-ANDERSON COMPANY

vs.

Sam K. Carson, Commissioner of Finance & Taxation

PRAECIPE FOR CERTIFIED TRANSCRIPT FOR USE IN THE SUPREME COURT OF THE UNITED STATES, IN CONNECTION WITH PETITION FOR WRIT OF CERTIORARI

[fol. 341] To the Clerk of the Supreme Court:

You are hereby requested to prepare and certify the entire record of the causes on file in the Supreme Court of Tennessee, together with the orders and opinion of that Court, except that the following portions shall be deleted:

1. Exhibit A and Exhibit B to each original bill, the same being included as Exhibits to the testimony of witnesses

duly filed.

2. Exhibits 1 and 2 to Stipulation dated June 7, 1949, and filed June 10, 1949, Exhibit 1 being document published by the United States Government Printing Office entitled "A General Account of the Development of Methods of Using Atomic Energy for Military Purposes under the Auspices of the United States Government, 1940-1945," written by H. D. Smyth, and the Exhibit 2 being page 1-22, inclusive,

of the "Fifth Semi-annual Report of the Atomic Energy Commission of the United States Government," dated January 1949, being also a document published by the United States Government Printing Office.

It is recognized that Judicial notice may be taken of the

entire contents of said documents.

3. The following documents are also agreed to be official documents of the United States Government and Judicial notice may be taken of the entire contents. Same are, therefore, deleted from the record:

[fol. 342] Hearings before the Committee on Military Affairs—House of Representatives, Seventy-Ninth Congress, First Session on H. R. 4280, October 9 and 18, 1945.

Hearings before the Special Committee on Atomic Energy, United States Senate, Seventy-Ninth Congress, Session on S. 1717, Part 1 and Part 3.

Hearings before the Special Committee on Atomic Energy, United States Senate, Seventy-Ninth Congress, First Session pursuant to S. Res. 179, Parts 1 and 3.

Hearings before the Joint Committee on Atomic Energy, Congress of the United States, Eighty-First Congress, First Session on Los Alamos Retrocession Bill and AEC Contract Policy.

Senate Document No. 96, 80th Congress, 1st Session. Letter from the Chairman and Members of the United States Atomic Energy Commission.

Report No. 1211, 79th Congress, 2d Session, Senate Atomic Energy Act of 1946.

Report No. 1186, 79th Congress, 1st Session—House of Representatives—Atomic Energy Act of 1945, and Part 2 of Report No. 1186.

The exhibits filed in the consolidated causes which are not deleted by this praecipe shall be certified and transmitted to the Clerk of the Supreme Court of the United States in their original form, as allowed by the order of the Supreme Court of Tennessee.

(S.) Allison B. Humphreys, Jr., Attorney for Petitioner, James Clarence Evans, Commissioner of Finance and Taxation of the State of Tennessee.

(S.) S. Frank Fowler, Attorney for Respondents. (S.) Berryman Green, Attorney for Intervening Petitloner, United States of America.

[fols. 343-346] Clerk's and Chief Justice's Certificate to foregoing transcript omitted in printing.

[fol. 347] [Stamp:] Received May 17, 1951, Office of the Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES

No. -, October Term, 1950

SAM K. CARSON, Commissioner of Finance, etc., petitioner,

VS.

ROANE-ANDERSON COMPANY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 6th, 1951.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 17th (seventeenth) day of May, 1951.

LIBRARY SUPREME COURT. U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 187

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION FOR THE STATE OF TENNES-SEE, PETITIONER.

vs.

CARBIDE AND CARBON CHEMICALS CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF TENNESSEE

PETITION FOR CERTIORARI FILED JULY 13, 1951. CERTIORARI GRANTED OCTOBER 15, 1951. 476.71, in all the sum of \$2.860.29, and

\$476.71, in all the sum of \$2,860.29, and all the costs of this cause, all of which will be certified for payment in the manner prescribed by law. 3/9/51.

[fol. 5] IN SUPREME COURT OF THE STATE OF TENNESSEE

Davidson Equity. Stay order

CARBIDE & CARBON CHEMICALS CORPORATION

VS.

Sam K. Carson, Commissioner of Finance and Taxation and

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation and

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON CHEMICALS CORPORATION

VS.

Sam K. Carson, Commissioner of Finance and Taxation and

WILSON WEESNER-WILKINSON COMPANY and ROANE-ANDER-SON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation

Decree-March 16, 1951

On application of James Clarence Evans, Commissioner of Finance and Taxation of the State of Tennessee, appellee in these consolidated causes, that the judgment heretofore entered in these consolidated causes be stayed pending application to the Supreme Court of the United States for the writ of certiorari, and it appearing to the Supreme Court of Tennessee from the statement of counsel and from the application that petition for the writ of certiorari will be filed in the Supreme Court of the United States within the ninety-day period fixed by law, and that counsel repre-

senting the opposing parties in these consolidated causes, [fol. 6] except the intervenor, has been notified of this application for a stay order, and has not appeared to resist the same:

It is ordered that the judgment entered in said consolidated causes be stayed for a period of ninety days from March 9, 1951. 3/16/51

(S.) A. B. Neil, Chief Justice, Supreme Court of Tennessee.

[fol. 7] IN SUPREME COURT OF TENNESSEE

CARBIDE & CARBON CHEMICALS CORPORATION

V8.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation, etc.

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON CHEMICALS CORPORATION

VS.

Sam K. Carson, Commissioner of Finance & Taxation, etc. and

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDER-SON COMPANY

VS.

SAM K. CARSON, Commissioner of Finance & Taxation, etc.

Opinion-March 9, 1951

For Appellants: S. Frank Fowler, Knoxville, Tennessee. For U. S. Government, Intervenor: T. L. Caudle, Ellis N. Slack, and Berryman Green, all of Washington, D. C.

Of Counsel: Joseph Volpe, Jr., Bennett Boskey, both of Washington, D. C., J. Wallace Ould, Jr. and Harold L. Price, Oak Ridge, Tennessee.

For Commissioner of Finance and Taxation, Appellee: Rcy H. Beeler, Attorney General; William F. Barry, Solicitor General; and Allison B. Humphreys, Jr., Advocate General, all of Nashville, Tennessee.

[fol. 8] The question for our decision in these consolidated cases is whether or not the appellants are liable for sales taxes and use taxes as applied by Chapter 3 of the Public Acts of 1947 as amended, Retail Sales Tax Statute.

Both of these taxes are privilege taxes and they have been defined by this Court as: "The sales tax imposes upon the seller a tax for the privilege of selling tangible personal property and is required to be paid by the seller. Hooten v. Carson, 186 Tenn., 282, 283, 209 S. W. (2d) 273. The use tax is a tax upon the privilege of using, consuming, distributing or storing tangible personal property after it is brought into this State from without this State." Madison Suburban Utility District v. Carson, — Tenn. —, 232 S. W. (2d) 277, 280.

The present suits were brought as test cases. During the fall of 1947, the appellants paid under protest a sum of money slightly in excess of \$5,000.00 to the Commissioner of Finance and Taxation, and brought suit, as provided by Tennessee Code sections 1790 et seq., to recover such taxes. It was said in argument that about two million dollars is eventually involved. After suits were instituted and during the progress of the trial, the United States government petitioned to and was allowed to intervene as an intervenor herein. The position taken by the United States government is identical in all respects with [fol. 9] that of the appellants named above. It was stipulated during the progress of the trial that since the suits were instituted, the Commissioner of Finance and Taxation was then James Clarence Evans and the suits were revived as to him.

The chancellor heid that the taxes were properly collected by the Commissioner of Finance and Taxation and accordingly dismissed the suits. These suits have been consolidated, were argued together, and it was agreed that we could render one opinion applicable to all, as the questions raised were identical. These suits involve a typical transaction between the contractors and the vendors wherein the question of whether or not this Tennessee sales

tax and use tax are applicable under the factual situation as

very thoroughly developed in this large record.

There are numerous assignments of error. As a whole, though, these assignments go to the finding or the failure of the chancellor to find facts according to the contention of the appellants. There are two contentions made by the appellants, both of which were answered contrary to their contention by the chancellor, either of which if answered in the affirmative would sustain the suits in these cases. These contentions are: (1) That the Tennessee Sales Tax Statute as applied to purchases and procurements herein is invalid and an infringement of the Federal constitutional immunity [fol. 10] of the means and instrumentalities employed by the United States to carry on its functions and (2) that if there is no implied Federal constitutional immunity under the facts developed in this case, that then under the terms of Section 9(b) of the Atomic Energy Act, creating this Federal agency, that Congress has exempted the property, income, and activities of the Commission from state or local taxation "in any manner or form."

Why these contentions?

Prior to our entering World War II in December, 1941, scientists were convinced that an atomic weapon could be These scientists with a group of others convinced the President of the United States and his advisers that this could be done. Accordingly, the President appointed a committee who in turn further convinced him of the possibilities of such a weapon, and from this the government began the development of facilities to develop such a weapon. It was necessary in the development of atomic energy that great secrecy be kept; that the proceedings toward development of such energy be greatly separated, for security reasons and for reasons of health and safety of the people of the United States, because "probably the largest calculated risk anyone ever took" (Smyth Report) was being undertaken. Thus, rather isolated large areas of land were acquired in different sections of the United States, such as approximately 59,000 acres in Anderson and Roane Counties, Tennessee on the Clinch River; Han-[fol. 11] ford, Washington on the Columbia River; and Los Alamos, New Mexico. Other places for research were acquired and used near the University of Chicago, etc.

As a part of this effort, the government in September, 1942 began to develop the Clinton Engineering Works, commonly called Oak Ridge, which was a unit of the Manhattan District established under the War Powers Act on executive orders of the President of the United States to carry on this research and development of the atomic bomb. The Manhattan District was under the direction of the United States Army Corps of Engineers; and the bomb was the immediate objective.

"A weapon has been developed that is potentially destructive beyond the wildest nightmares of the imagination; a weapon so ideally-suited to sudden unannounced attack that a country's major cities might be destroyed overnight by an ostensibly friendly power. This weapon has been created not by the devilish inspiration of some warped genius but by the arduous labor of thousands of normal men and women working for the safety of their country." Smyth Report, page 163, released in August, 1945.

Because of the enormity of the problem that was involved and the fact that no individual or corporation had had any experience in this particular kind of a field, it was necessary for the Army Engineers to employ various and sundry large corporations of America who had the "know-how" in various and sundry scientific fields and other fields which [fol. 12] were necessarily involved in the development of atomic energy. Consequently, the government entered into cost-plus-fixed-fee contracts with these corporations. mention a few are: Carbide & Carbon Chemical Corporation; Monsanto Chemical Corporation; General Electric Corporation; DuPont Company, and many others. It soon developed that it would be necessary to construct housing facilities for the workers and employees and key personnel of these various companies who were to operate these enormous plants. For instance, at Clinton, Tennessee, an entire new city of some forty of fifty thousand people grew up almost overnight. To operate this city for these people, all of the facilities for a moder city were needed. The Army did not possess the "know- ow" to develop such a city but they had had experience with a construction company in New York who knew how to do such a thing, consequently, this construction company was contacted and they in turn formed the Rosne-Anderson Company, a Tennessee corporation, for the purpose of operating the Town of Oak Ridge. Roane-Anderson entered into a cost-plus-fixed-fee contract with the Army for this work. The Carbide &

Carbon Chemical Corporation entered into a like contract with the government to operate certain plants at Oak Ridge.

This development under the Army Corps of Engineers was of course designed to achieve the maximum military result which it did, as all of us now know. In the develop-[fol. 13] ment of nuclear energy it became apparent to those connected with this development that it would be necessary Q for the government to maintain some sort of control in this field after the war. As a result of this feeling, recommendations were made to the Congress of the United States who after a full debate passed an Act for the development and control of atomic energy, August 1, 1946. This complete Act is carried in U. S. C. A. 42, Sections 1801 through 1819. By this Act, the Atomic Energy Commission was created, and they constitute a committee having a governmentalmonopoly in this field of atomic energy. This Act, among other things, declares that "the development and utilization. of atomic energy shall, so far as practicable, be directed toward improving public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting World peace." . .

The Atomic Energy Commission, having a right to do so under the Act, saw that their duties were so gigantic and complicated techincally that it would be impossible for any one company to handle their undertakings. Accordingly, the Commission has entered into various and sundry costplus-fixed-fee contracts with various and sundry contractors who possess the "know-how" in their respective fields. The Commission in this way either directly or through these contractors, carries on a wide and extensive program for the United States government in the field of atomic [fol. 14] energy, including the production of materials for atomic weapons, and the production of radio-active materials for the use and research and development activities relating to atomic energy. The plants selected and established by the Army Corps of Engineers have been continued.

The land and all facilities in the plant at Oak Ridge are

wholly owned by the United States government.

The principal contractor of the Commission in Oak Ridge for the operation of its plants there is the appellant Carbide & Carbon Chemical Corporation (hereinafter for short referred to as Carbide.) The town management contractor for the Town of Oak Ridge is the appellant, Roane-Anderson Company (hereinafter referred to as Roane-Anderson).

Carbide operates the production facilities at Oak Ridge and these concentrate on the production of uranium 235, a fissionable material, over which the Commission is given by the Act monopoly. Carbide also operates various and sundry other plants there. Carbide also operates at present the Oak Ridge National Laboratory, a laboratory for atomic energy research. In the laboratories, research of fundamental importance to production and use of fissionable material is carried on and radioactive isotopes which are proving an enormous benefit to medical, biological, agricultural, and industrial research of all kinds are produced and distributed.

The Town of Oak Ridge, as heretofore said, is located on [fol. 15] Commission owned site and exists for the sole purpose of providing the necessary community facilities and services to some thirty-odd thousand people employed by the Commission and its contractors at the Oak Ridge installation. Most of the necessary town management functions and services are carried out by Roane-Anderson pursuant to its cost-plus-fixed-fee contract. Roane-Anderson operates the normal municipal services, such as utilities, fire protection, garbage disposal, and maintenance of roads and streets, and also oversees the operation of concessions, and performs a number of other services necessary to the welfare of the employees at the atomic energy facilities.

The first two cases brought are for the purpose of testing the use tax where Carbide and Roane-Anderson purchased from an out-of-state vendor. The third and fourth cases are to test the sales tax, the third being where coal was bought by Carbide from the Diamond Coal Mining Company and the other being a machine bought by Roane-Anderson

from the Wilson-Weesner-Wilkinson Company.

The first contention made by these appellants, along with the United States Government, is that Carbide and Roane-Anderson are not independent contractors but are agencies or instrumentalities of the United States Government, and are, therefore, not subject to the tax. If the appellants are independent contractors, they would be liable for the tax [fol. 16] because the implied immunity under the United States Constitution would not apply to them for reasons hereinafter set forth, unless this implied immunity is properly implemented by a Congressional Act. Let us, therefore, first investigate the contracts between these appellants and the Commission and try to determine whether or not they

The distinctions between an independent contractor and an agent are not always easy to determine, and there is no uniform rule by which they may be differentiated. "Generally, the distinctions between the relation of principal and agent and employer and independent contractor is based on the extent of the control exercised over the employee in the performance of his work, he being an independent contractor if the will of the employer is represented only by the result, but an agent where the employer's will is represented by the means as well as the result." 2 C. J. S., page 1027.

The distinction generally between an independent contractor and an agent "depends upon the intention of the parties as expressed in the contract." Standard Oil Co. of La. vs Fontenot, La. 4 So. (2d) 634, 643. We must, therefore, in the first instance look to the contract between these parties for the intention therein expressed rather than look to the Acts of the parties. Of course, every case must be [fol. 17] determined under the contract and the facts of the particular case. It frequently occurs, as it apparent does in the instant case, that contractors have made a contract with a party and have served over a long period of time in such an efficient and excellent manner that the contractor acts somewhat in many capacities as though he were the agent of the person with whon; he has contracted. is especially true in a cost-plus-fixed-fee contract wherein the contractor is reimbursed for any and all expenditures and he is doing the character of work he does in the instant cases. The operations of these contractors are in general separate from the normal scope of business operations of the companies; Roane-Anderson was established for the sole purpose of carrying out its community management activities under contract with the Commission; and Carbide has set up a separate division to carry out its contract withthe Commission. The contracts are of a long-term, continuing relationship between government and industry. They do not contemplate the performance of a particular narrowly-defined task which the outlines are fully known in advance, but are entered into with knowledge that operations are subject to continual revision, modification, and change, in the light of technical development and as a result of the evolution of Commission policy.

The programs carried on by these contractors are pro-

grams for which the Commission is responsible. The pature [fol. 18] and scope of these programs obviously is subject to the determination of the Commission but at the same time the contractor possessing the "know-how" in its own particular field conducts its work according to its determination of how this work should be done. The land, materials, equipment, supplies, plans, designs, and records used in the operation of the facilities, as well as the products of the operation, belong to the Commission. Knowledge, techinques, inventions and discoveries gained from the work are subject to strict control by the Commission. The work of the contractors is subject to close supervision at all stages and at all times by representatives of the Commission who have offices at the Oak Ridge site, and whose chief responsibilities center on the operations carried on by the operating These Commission representatives establish policy, supervise and inspect the work, redw sub-contracts and purchases for approval, inspect and audit the records in accounts of the contractors, and cooperate with the contractors in the solution of the manifold problems connected with the operating of the facilities. The work must be carried on in accordance with the safety and security regudations of the Commission, and those employees of the contractors who have access to restricted data are investigated by the F. B. I., and given security clearance by the Commission. Key personnel of the contractors' organizations may be employed with the approval of the Commission, [fol. 19] The salaries of all of their employees are contolled by policies and standards approved by the Commission and the Commission may direct the dismissal of any such employees whom the Commission deems "incompetent, careless or insubordinate," or whose continued employment is deemed inimical to the public interest.

The contractors are not required to risk their own money in the operation of Commission facilities. This provision of the contract obviously came about by reason of the enormity of the project, the newness of what was being done and of the uncertainty of the result. It is said that "regardless of what happened the government would pay the bill" and it was on this basis that the contracts were originally made with the various companies in the production of atomic energy. All the contracts have a "hold-harmless" provision and the expenses and procurements are on a reimbursable basis. The Carbide contract specifically provides that Car-

bide shall not be obligated to use any of its own funds in the performance of work under the contract, and further provides that, upon request of the contractor, the government shall advance monies to be used for carrying out the purposes of the contract. Under this provision, Carbide has used only government money for activities under its contract. Roane-Anderson originally used some of its own money in performing its contract, revenues which it collected from concessionaries and occupants of housing in Oak Ridge [fol. 20] soon made up the greater part of its funds which were used in the contract. Roane-Anderson's contract provided that such monies collected should be used to reduce the cost of the work. Since October, 1948, Roane-Anderson has been receiving advances to carry on its work in the same manner as Carbide.

Most of the materials and supplies necessary to the operation of the Commission facilities are purchased by or through the contractors. By contract the Commission reserves the right to pay suppliers directly, but customarily permits payments to be made by the contractors, who are then reimbursed by the government. Although the contracts originally provided that title to articles acquired under the contracts shouls pass to the government at a point designated by the contracting officer, the record shows that as a matter of practice, title to such articles has never been considered to be in the contractor but has always been treated as having passed to the government at the time title passed from the vendor. The language of the contract is contrary to the existing practices of the parties. Since 1948, the contract of Roane-Anderson has provided expressly that in the procurement of supplies necessary to the performance of work under the contract, Roane-Anderson should act as the agent of the government, but "all personnel and labor shall be and remain for all purposes the employees of the Contractor."

[fol. 21] The record shows that ordinarily the vendor looks to the contractor for payment. The custody then is vested in the contractor who puts it in one of the various storing houses of the Commission and the property is stamped to show that the property belongs to the United States Government and then with another designation of either Carbide or Roane-Anderson. The goods are usually shipped on a government bill of lading or on a commercial bill of lading with a notation to be converted to government

bill of lading at destination. This was done to save some cost in shipment expenses. Since 1948, the contractor has paid the Federal transportation tax except where shipment was to the Government on a government purchase order.

The general manager of the Commission in a statement suffnitted to a congressional committee on February 17,

1949, in part said:

"Operation of our plants and laboratories through established independent contractors not only gives to the Atomic Energy Program substantial benefits from accumulated experience and established facilities; it also establishes the interest and the support of industry and universities for future private development."

Of course, the terming of these contractors, "independent contractors" by Mr. Wilson does not necessarily deter[fol. 22] mine the question. We must look to the contracts, facts and intent of the parties, etc. as heretofore said. This, though, does give a rather clear statement as to what the intention of the Commission was in making these contracts.

Another indication and illustration as contained in the contracts is that if the bills for the purchase of materials, machinery or equipment or payrolls are not paid promptly by the contractor or the sub-contractor, the contracting officer may in his discretion withhold payments otherwise due, equivalent to the amounts of such unpaid items. The contract also provides that upon the completion of the work that the Government in making settlement with a contractor may withhold any sum necessary to settle claims against the contractor. The contract provides: "The contracting officer shall accept the completed work hereunder with reasonable promptness."

The nature of the plant operation is such that the government does not have on its staff or in its employ the technical mans or qualifications to operate the plant. Each of the plant of the plants is operated by a contractor who has considerable experience in the industrial operation of a chemical separation plant and gaseous diffusion plants, electromagnetic separation plants, etc. The work of Roane-Anderson in city management is a specialty for which they were particularly selected.

We must hold that after making a rather thorough study

[fol. 23] of the contracts of Carbide and Roane-Anderson and the facts developed in this record, that these contractors are independent contractors. Omitting for the present any consideration of the provisions of the Atomic Energy Act. with reference to the contractors herein, we might say that. as far as we know the Congress has never seen fit to pass a general act immunizing general contractors who are doing work for the government wherein the government in the end had to pay the taxes assessed against the contractors. The reason that Congress has not passed such a general act is probably because "the burden of Federal taxation necessarily set an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the Federal Government affect in some measure the cost of operation of the other." As "neither government may destroy the other or curtail in any substantial manner the exercise of its powers," the taxing power of each, so far as it affects the other, "must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax-or the appropriate exercise of the functions of the government affected by it." Metcalf & Eddy v. Mitchell, 269 U. S. 574, 46 S. Ct. 172, 70 L. Ed. 384.

[fol. 24] The recent decisions of the Supreme Court of the United States have held that state taxes on independent contractors with the United States Government were subject to collection and that there was no implied immunity insofar as these independent contractors were concerned. A very excellently reasoned case is that of James.v. Dravo Contracting Company, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155, 114 ALR 318; wherein a state tax on the gross receipts of a contractor with the Federal government was allowed: State sales and use taxes on purchases of materials used by a contractor in performing a cost-plus-fixed-fee contract with the United States was allowed in State of Alabama v. King & Boozer, 314 U. S. 1, 62 S. Ct., 43, 86 L. Ed. 3, 140 ALR 615; Curry v. U. S., 314 U. S. 14, 62 S. Ct. 48, 86 L. Ed. 9. The Court in King & Boozer ease, supra, pointed out that "-the Constitution, unaided by congressional legislation (does not prohibit), a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the government. So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the government, that is but a normal incident of the organization within the same territory of two independent taxing solvents. The asserted right of the one to be free of taxation by the other does not spelt immunity from paying the added cost, attributable to the taxa-[fol. 25] tion of those who furnish supplies to the government and who have been granted no tax immunity." (Emphasis ours.)

The question is now foreclosed under the authorities last above cited. True, eminent legal minds have differed on the conclusions reached in these cases, as is evidenced by the very strong dissent of Mr. Justice Roberts in which he was joined by Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler in James v. Dravo, supra. This dissent and many authorities therein cited runs somewhat like the argument on behalf of the contractors in their insistence on the first contention made, that is, that the contractors herein had an implied immunity from state taxation because the Federal government was bearing the burden of this tax.

The second contention has given us far greater concern than the first and as we view it, it is the question in the lawsuit.

We assume, since to question is here raised, that the creation of the Atomic Energy Commission, 60 Statute 755, 42 U. S. C. A., 1801-1819, was a constitutional exercise of "the congressional power and that the activities of the Commission through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments." Pittman v. Home Owners' Loan Corp., [fol. 26] 308 U. S. 219 60 Sct. 15, 84 L. Ed. 11, 124 ALR, 1263.

It was conceded in the argument that the Congress has the power to protect the instrumentalities thus created by it. This concession must necessarily follow in view of certain provisions of the United States Constitution, as follows:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the

territory and other property belonging to the United States—." Article IV, Sec. 3, Cl. 2. It also gives Congress the power "To make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States." Article I, Sec. 8, Cl. 18, U. S. C. A. It makes the laws of the United States enacted pursuant thereto, "the supreme law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Article VI, Cl. 2.

This power of Congress to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of agencies of the Federal government has been recognized a number of times by the Supreme Court notably [fol. 27] in Pittman v. Home Owners' Loan Corporation, supra; Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95, 62 S. Ct. 1; U. S. v. Allegheny County, 322 U. S. 174, 64 S. Ct. 909, 88 L. Ed. 1209, and other cases therein cited. In the Pittman case, it was said by the Court that:

"In the exercise of this power to protect the lawful activities of its agencies, Congress has the dominant authority which necessarily inheres in its action within the national field."

In questions of the kind, whether immunity shall be extended to situations like those in the instant cases is essentially a legislative question, because as we have seen above, in the treatment of the first contention made herein, such immunity is not granted when unaided by congressional legislation. Did the Congress of the United States enact appropriate legislation to immunize the contractors involved in the instant case!

If such immunity exists, it is derived from Section 9(b) of the Atomic Energy Act (42 U.S. C. A., Sec. 1809). The answer to the question rests primarily upon a proper construction of this section of the Act. The pertinent part thereof is as follows:

"The commission, and the property, activities, and income of the Commission, are hereby expressly exempted from

taxation in any manner or form by any state, county, municipality, or any subdivision thereof." (42 U. S. C. A. Sec. 1809, sub-division b.) (Emphasis ours.)

[fol. 28] Obviously, the question presented is whether the purchase and use of materials and supplies by cost-type contractors of the Atomic Energy Commission in the performance of their contracts are part of the "activities-of the Commission" within the intendment of the provision just quoted and are thereby exempted from taxation by any state, county or subdivision thereof "in any manner or

The Atomic Energy Commission as an agency of the executive branch of the United States Government is en titled to all the privileges, immunities and rights of the United States, including that of immunity from state and local taxation. Graves v. N., Y., ex rel O'Keefe, 306 U.S. 466, 59 S. Ct. 593, 83 L. Ed. 927, 120 ALR 1466. This is and would have been true had Section 9(b) of the Act above quoted not been included in the Act.

Section 9(b), in its first three sentences authorizes the Commission under stated conditions and circumstances to make payments to state and local governments (in its discretion) for loss to them of taxes due to the government taking this property and it is noted that there is no submission to state and local taxation. In the fourth and concluding sentence of Section 9(b), Congress provided the exemption above quoted in which it specifically says that the "activities" of the Commission shall not be taxed "in any manner or form."

Should we give this exemption a narrow construction or [fol. 29] should the exemption be construed by us so as to give it a scope commensurate with the broad activities carried on by the Commission at its major installations?

The chancellor was of the opinion that since Congress had included the word "agents" in the third sentence of Section 9(b) of the Act, that is the sentence immediately preceding the exemption sentence above quoted, that it was not the intention of Congress to relieve these contractors from taxation. His reasoning is based upon the fact that since 9(b) expressly authorized the Commission to reimburse state and county or local governments for the amount of taxes lost by them due to the acts of the previous parties and the Manhattan District and their agents that then by

eliminating the word "agents" out of the exemption provision that this clearly indicated that Congress did not intend to include these contractors in the exemption.

We do not see how the Congress could have chosen a much broader word than it did when it chose the word "activities" to use in its application for those things that were exempt from taxation "in any manner or form." It seems that there was absolutely no reason, in view of using this broad term "activities" to specify individuals or individual actors because the term within itself would cover anything that the Commission was undertaking to do.

Congress prior to the enactment of the Atomic Energy Act and subsequent thereto knew of the services of operating contractors at the major atomic energy installations [fol. 30] and knew that it had been the practice of the Manhattan Engineering District to conduct its activities through these operating contractors. At Oak Ridge, for example, the Monsanto, Carbide and Roane-Anderson and Stone and Webster and numerous other contractors operated in conducting the activities there and these contracts which were entered into then by the Manhattan District were transferred over to the Atomic Energy Commission by executive order of the President. At the Hanford operations the Duront Company had served as an operating contractor during the war and was succeeded by the General Electric Company. At Los Alamos the University of California had been the operating contractor for the weapons work from the very start of activities at that remote site. Similarly, the University of Chicago had been the operating contractor for the Atomic energy activities centered in the Chicago area. The Carbide people had operated the gaseous diffusion production facilities at Oak Ridge since they were constructed. The Roane-Anderson people were specially formed for the purpose of managing and operating the Town of Oak Ridge for the Manhattan District. All of these circumstances were well known to the Congress when it had under consideration the various proposals for atomic energy legislation.

At the time hearings were held on the May-Johnson Bill (H.R. 4280, H.R. 4566, 79 Cong., 1st sess.) and the McMahon [fol. 31] Bill (S. 1717, 79 Cong., 1st sess.) Congress had before it the Smyth Report, which we have heretofore referred to and quoted from, which recounted the major role

When Congress created the Atomic Energy Commission it knew the contracts of Roane-Anderson and Carbide and Carbon were in existence and that the Atomic Energy plant at Oak Ridge, Tennessee, was being constructed and operated by these independent contractors under the provisions [fol. 80] of said contracts.

The Atomic Energy Act authorized the Commission to perform the work and functions assigned to it by the Act or to have it done by others. The Commission elected to continue the operations at Oak Ridge under the contracts entered into with Roane-Anderson and Carbide and Carbon by the United States Corps of Engineers rather than undertake the performance of the work with its own employees. An explanation for this decision may be found in the Commission's report to the Congress.

The contracts provide that the Government can furnish materials and supplies and pay for them or the contractors made the purchases. Uniformly the contracts entered into be the contractors for the purchase of materials provided that they are "assignable to the United States Government."

The proof indicates that the details of making purchases and transferring personal property to the Government has not always been carried out as provided by the contracts. Nevertheless, the relationship and rights of the parties are determined by the provisions of the contracts and not by the unauthorized acts of their employees.

All purchases involved herein were made by the respective contractors and paid for by them from bank accounts maintained by them as required by these contracts. It is true the money was furnished by the United States Government, but this was done pursuant to the provisions of the contracts.

The contracts provide that Roane Anderson and Carbide and Carbon shall not pledge the credit of the United States of America.

Very able briefs have been filed by Counsel representing the parties hereto in which a number of questions are discussed, not dealt with in this opinion. However, the Court [fol. 81] is of the opinion that the matters discussed herein are determinative of the issues involved and, therefore, discussion of other questions is deemed unnecessary. The Tennessee Retailers Sales Tax Act levies a tax on the vendor of personal property for the exercise of the privilege of engaging in the business of making sales in Tennessee and is not a tax upon the sale transactions nor is it a tax on the vendee.

Hooten v. Carson, 186 Tennessee 287.

This decision by the Supreme Court of Tennessee is conclusive and binding.

Erie Railroad Co. v. Thompson, 304 U. S. 69.

Roane-Anderson and Carbide and Carbon and independent contractors engaged in business for profit under cost-plus-fixed-fee contracts with the Atom Energy Commission and unless a change has been brought about by the enactment of the Atomic Energy Act, complainants are not entitled to the relief sought in these proceedings. The "fee" paid these contractors is not divulged.

Alabama v. King & Boozer, 314 U. S. 1. Curry v. United States, 314 U. S. 14.

For the reasons stated at length in our opinion in the King & Boozer case we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the Government, were not agents or instrumentalities of the Government; and they are not relieved of the tax, to which they would otherwise be subject, by reason of the fact that they are Government contractors. If the state law lays the tax upon them rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government like the individual, only as the economic. burden is shifted to it through operation of the contract. [fol. 82] As pointed out in the opinion in the King and Boozer case, by concession of the Government and on authority, the Constitution, without implementation by congressional legislation, does does not prohibit a tax upon Government contractors because its burden passed on economically by the terms of the con ract or otherwise as a part of the construction cost to the Government.

Curry v. United States, supra.

"The Government, to support its thesis that it was the purchaser, insists that title to the lumber passed to the Government on shipment by the seller, and points to the very extensive control by the Government over all the purchases made by the contractors. It emphasizes the fact that the contract reserves to Government officers the decision of whether to buy and what to buy; that purchases of materials of \$500 or over could be made by the contractors only when approved in advance by the contracting officer; that the Government is reserved the right to approve the price, to furnish the materials itself, if it so elected; and that in the case of the lumber presently involved, the Government inspected and approved the lumber before the shipment. From these circumstances it concludes that the Government was the purchaser. The necessary corollary of its position is that the Government, if a purchaser within the taxing statute, became obligated to pay the purchase price.

"But, however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to [fol. 83] pledge its credit. See United States v. Algoma Lumber Co., 305 U. S. 415, 421, 83 L. ed. 260, 263, 59 S. Ct. 267; United States v. Driscoll, 96 U. S. 421, 24 L. ed. 847. Itcan hardly be said that the contractors were not free to obligate themselves for the purchase of materials ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the Contracting Officer, which stipulated that it did not bind or purport to bind the Government, cumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract, Cf. James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318, supra; United States v. Driscoll, supra.

"We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstances that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318, supra."

Alabama v. King & Boozer, supra.

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It is insisted by the complainants and the United States of America that Section 9(b) of the Atomic Energy Act [fol. 84] expressly exempts transactions such as those reflected by the record herein from taxation. The language of the Act relied upon is as follows:

"In order to render financial assistance to those states and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to state and local taxation, the Commission is authorized to make payments to state and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the state or local government by activities of the Commission, the S Manhattan Engineer District or their agents. In any such case, any benefit accruing to the state or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities and income of the Commission, are hereby expressly exempted from taxation in any manner form by any state, county, municipality or any subdivision thereof."

A careful study of the language contained in this Section reveals that the Commission is directed to take into consideration the burdens its activities and the activities of its agents might cast upon the state and local governments when considering the amount of tax to be paid to those authorities in lieu of property taxes but in the last sentence

quoted above, which grants exemption from taxation, it is [fol. 85] only the Commission, its property, its activities and its income which are Expressly exempt from taxation in any manner or form by any state, county, municipality or any subdivision thereof." It results that the failure of the Congress to use the word "agents" in the last sentence wherein the Commission was exempt from taxation indicates clearly that the Congress did not intend that the Commission's agents or those with whom it deals should also be exempt from taxation.

The Congress has upon numerous occasions expressly refused to exempt contractors engaged in work for the Government under cost-plus-fixed-fee contracts from the burdens of taxing statutes. This point was commented upon in Alabama v. King & Boozer, supra and also in

Standard Oil Co. v. Fontenot, 4 So. (2) 637.

It is well established that a fixed policy of the Government will not be changed by presumption. The intention to bring about a change of an established policy must be expressed in apt words and not left to conjecture.

Expressing the same thought, the Supreme Court, in Robertson v. Railroad Labor Board, 268 U.S. 618, said:

"It is not lightly to be assumed that Congress intended to depart from a long-established policy."

It will, therefore, not be presumed that the Congress intended to grant exemptions from taxation to private corporations organized for profit engaged in performing work under cost-plus-fixed-fee contracts with the Atomic Energy Commission.

No authority is cited which empowers a governmental agency to convert a corporation engaged in business in its own behalf for profit into an "instrumentality of Government" and thereby extend to it exemptions from taxation. This would be vesting the governmental agency with legislative powers and could work a destruction of the Government. [fol. 86] Consequently, the Court will not presume that it was the intention of the Congress to vest the Commission with the power to select those who should enjoy immunities of taxation by using the word "activities" in Section 9(b) of the Atomic Energy Act.

The bills in these four cases and the intervening petitions will be dismissed, decrees accordingly.

Alfred T. Adams, Special Chancellor.

[fol. 87] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65015

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance and Taxation, etc.

No: 65164

WILSON-WEESNER-WILKINSON CO.

VA.

SAM K. CARSON, Commissioner of Finance and Taxation, etc.

No. 65014 .

CARBIDE AND CARBON CHEMICALS CORP.

VS.

Sam K. Carson, Commissioner of Finance and Taxation, etc.

No. 65163

DIAMOND COAL MINING COMPANY

vs.

Sam K. Carson, Commissioner of Finance and Taxation, etc.

In Part Two of the Chancery Court of Davidson County, Tennessee

ADDENDUM, TO OPINION-May 25, 1950

Since the opinion was filed in the above cases, it has come to the Court's attention that an erroneous statement of fact is contained therein, to wit:

"The contracts provide that Roane-Anderson and Carbide and Carbon shall not pledge the credit of the United States of America."

This statement is applicable to the Carbide and Carbon contract but the Roane-Anderson contract does not contain this provision.

The Court is of the opinion that this is not determinative of the issues involved and therefore no change than as above

stated is made in the opinion so filed.

Alfred T. Adams, Special Chancellor.

[fol. 88] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65014

CARBIDE AND CARBON CHEMICALS CORPORATION

VS.

SAM K. CARSON, Commissioner,

and

No. 65163

. DIAMOND COAL MINING COMPANY

and

CARBIDE AND CARBON CHEMICALS CORPORATION

Sam K. Carson, Commissioner

Complainants' Request for Findings of Fact-Filed July 21, 1950

Come the complainants Carbide and Carbon Chemical Corporation and Diamond Coal Mining Company, in the above causes which have been consolidated for trial, and pray that the Court make the following findings of facts:

1. The complainant Carbide and Carbon Chemicals Corporation is a cost-plus-fixed-fee contractor of the United States Atomic Energy Commission operating under Contract W-7405-Eng-26 at Oak Ridge, Tennessee. The complainant Diamond Coal Mining Company is a commercial firm which sold to the Carbide and Chemical Corporation for use by the latter in the performance of its contract with the Atomic Energy Commission.

- 2. The facts of these cases are developed from the allegations of the complaints which the answers thereto admit or fail to deny and from the depositions taken on December 13 through 15, 1948 and on April 4, 1949, and stipulations agreed to by the parties.
- 3. The complainant Carbide and Carbon Chemicals Corporation on November 23, 1943, entered into a contract with the United States of America, as an incident to the [fol. 89] prosecution of World War II then in progress, and designated by the parties thereto as Contract W-7405-Eng-26. That contract and the amendments thereto through June 30, 1948 are Exhibits 1, 2 and 19 herein. The scope of work contemplated under said contract was important at that time and remains important at this time in relation to matters of extremely grave concern to the national welfare, security and defense. The complainant Carbide and Carbon Chemicals Corporation promptly entered upon the performance of said contract, has been engaged therein ever since, and is so engaged at the present time.
- 4. The Act of Congress of August 2, 1946 (Public Law 585-79th Congress, 42 USCA 1801, et seq.), known as the Atomic Energy Act of 1946, duly prov-des for the transfer of all properties, responsibilities, duties, rights, etc., from the Government's agency which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which the complainant Carbide and Carbon Chemicals Corporation then and now maintains its offices and carries on its work under said contract.
- 5. The government agency through which said work had been carried on until the transfer to the Atomic Energy Commission was known as the Manhattan Engineer District of the United States Army Corps of Engineers. Acting pursuant to and in accordance with the provisions of said Act, the President of the United States duly issued Executive Order No. 9816, dated December 31, 1946, which transferred to and made the aforementioned contract, a contract between the Atomic Energy Commission, an agency of the United States of America, and the complainant Carbide and Carbon Chemicals Corporation as of midnight December 31, 1946.

[fol. 90] 6. As a necessary and integral part of the work

under and in the course of action required by said contract, the complainant Carbide and Carbon Chemical Corporation has purchased property of the kind described as being taxable under the Tennessee Retailer's Sales Tax of 1947, and will continue to purchase such property in the performance of its contract.

7. The complainant Carbide and Carbon Chemical Corporation has paid Tennessee sales and use taxes on the purchases of property for use under its contract with the Commission and described as being taxable under said statute. On October 15, 1947, complainant Carbide and Carbon Chemicals Corporation paid to the defendant Sam K. Carson \$2,383.58 which sum was claimed by said defendant to be payable as the "use tax" on purchases by the complainant Carbide and Carbon Chemicals Corporation from outside the State of Tennessee for use under its contract with the Commission for the month of September, 1947. Said tax was paid under protest and involuntarily, and suit to recover same begun within the time provided by law. During November, 1947, the complainant Carbide and Carbon. Chemicals Corporation purchased in Tennessee from the complainant Diamond Coal Mining Company several thousand tons of coal for a sales price of \$107,402.23. The complainant Carbide and Carbon Chemicals Corporation paid to the complainant Diamond Coal Mining Company said sales price, together with the sum of \$2,148.08 representing the "sales tax" claimed by the defendant Sam K. Carson, Commissioner of Finance and Taxation, to be due on this purchase, which tax was duly paid by the complainant Diamond Coal Mining Company to said defendant under protest and involuntarily on December 19, 1947, and suit to recover same begun within the time prescribed by > law.

8. All of the procurements of property by the complainant Carbide and Carbon Chemicals Corporation asserted to be taxable by the defendant under said Tennessee Sales [fol. 91] Tax statute were purchased solely for use under its contract with the Commission, and were obtained under, and handled through, the same procedures and arrangements as the purchases of said complainant described in the testimony and the exhibits attached. The Carbide and Carbon Chemicals Corporation procedures and forms are shown by Exhibits 3 through 12, and 13 through 18.

9. As the legality of the tax collections here under consideration involve the legal status of the complainant Carbide and Carbon Chemicals Corporation under its contract with the United States Government, this contract and the

complainant's operations will be summarized.

10. The Town of Oak Ridge was built for the sole purpose of housing workers necessary for the construction and operation of the Government's plants at Oak Ridge. The Government acquired by purchase or condemnation all of the land, some 59,000 acres, on which the city and the plants were built, although it did not take exclusive jurisdiction thereof. It is stipulated by the parties that all the buildings on the land comprising the area known as the Clinton Engineering Works, including the Town of Oak Ridge, were built for the Government and belong to the Government. (P. 211, following depositions in Carbide case.)

11. By Contract W-7405-ENG-26, as amended from time to time, the Carbide and Carbon Chemicals Corporation contracted with the Government to carry on certain research and experimental work, to provide consultant services, to train personnel to operate certain Governmentowned plants, and to operate for the Government said Government-owned plants then being constructed for the production of U-235, or otherwise related to the Atomic Energy program of the Government in Oak Ridge, Tennessee. This was a cost-plus-a-fixed fee contract.

12. As of July 1, 1947, and continuously from that date. Carbide and Carbon has operated for the Commission in [fol. 92] Oak Ridge, all of the Government-owned plants and facilities for the production of fissionable materials; namely, the K-25 plant and the Y-12 plant. Since March 1, 1948 Carbide has also operated the Oak Ridge National Laboratory. The scope of the work carried on in these plants, while not subject to disclosure in detail for security reasons, may be stated generally as encompassing the production of fissionable material for use in military weapons, and the production of radioactive materials for use in peacetime applications of atomic energy in the fields of biology and medicine, for industrial uses, and for many types of re-The Carbide and Carbon Chemical Corporation also carries on in the plants an extensive program of research and development in various phases of the atomic energy field as directed by the Commission.

13. The contract under which these operations are carried on may be described as a management contract whereby Carbide and Carbon Chemicals Corporation provides the personne and certain technical experience; and the Government provides programs to be carried out. The actual plant operations are carried on under the control of employees of Carbide and Carbon subject to and in accordance with policies and instructions of the Government (Exhibit 1. Article V-A. D. E. F. G. I. testimony, p. 199.) Carbide and Carbon owns none of the real or personal property making up the plants or used in the operation of the plants.

14. The contract provides that in the operation of the plants, Carbide and Carbon shall do all things necessary or convenient "in and about the operation and closing down" of the plants (Exhibit 1, Article V-A, p. 4.) though the basic facilities are provided by the Government, and the supplies of uranium and certain other materials are furnished from time to time by the Government, operation of these plants includes the securing or purchasing of all the labor, tools, machinery, equipment, supplies and ser-

vices needed in connection with the plant.

[fol. 93] 15. By this contract the Government agreed to pay Carbide and Carbon its cost of the work plus a fixed fee based on the estimated cost at the time the contract was entered into (Exhibit 1. Article C and VI.) The fixed fee is subject to increase or decrease owing to such changes as the Government might require in the contract, but is not subject to any adjustment in case the actual costs vary from the estimated cost. The contract expressly provides that all the work is to be at the expense of the government; that the Government shall hold Carbide and Carbon harmless against any loss or damage occurring unless due to the wilful misconduct or bad faith of the Company's officers (Exhibit 1, Article VIII-A, Supplement 19); and that Carbide and Carbon is under no obligation to use any of its own funds in the performance of the contract (Exhibit 1, Article VI-D). Carbide and Carbon has not used any of its own funds in the performance of this contract (testimony, p. 100), and all of the costs thereof have been paid from monies advanced by the Government for that purpose (Exhibit 1, Article VI-C), or from revenues received by Carbide and Carbon Chemicals Corporation for the Government's

account and used in reducing the cost of the work (Exhibit 1, Article V, Section 5, and Article IX.)

16. Title to purchased materials for which Carbide and Carbon is entitled to reimbursement vest in the Government in accordance with the contract (Exhibit 1, Article VIII-A, Section 4, Supplement 8), and the purchase orders issued by Carbide (Exhibit 6).

17 Article VIII-D, Section 3 of Exhibit 1 provides that Carbide and Carbon shall make all purchases in its own name and not bind or purport to bind the Government, and that all purchases in excess of \$2,000.00 will be approved by the Government before being made.

[fol. 94] 18. The contract further provides that salaries and expenses of Carbide and Carbon employees to be reimbursable under the contract must be approved by the Government, and certain key personnel may not be employed without prior approval of the Government (Exhibit 1, Article VI-A, Exhibit 19). The Government may require Carbide and Carbon to dismiss from the contract work any employee whom the Government deems to be incompetent, careless, insubordinate, or whose continued employment is considered inimical to the public interest (Exhibit 1, Article VIII-D). All labor disputes, or threatened disputes, must be brought to the attention of the Government (Exhibit 1, Article VIII-N). All patentable discoveries made by Carbide and Carbon or its employees in the performance of the contract must be reported to the Government, which will determine whether same will be patented, and the disposition of title to and any rights under any patent which may result (Exhibit 1, Article VIII-R). All technical data, notes, drawings, designs, and specifications prepared by Carbide and Carbon in the performance of the contract became the property of the Government and will be delivered over to the Government whenever requested (Exhibit 1, Article VIII-Y). The contract provides for the payment of employee benefits for death or injury due to certain hazards peculiar to the Atomic Energy program, when approved by the Government (Exhibit 1, Article VIII-BB, Supplement 22)...

19. The raw materials for use in these Governmentowned plants is procured and furnished by the Government, and its use carefully and systematically controlled and accounted for under the direction and supervision of the Government (testimony, p. 197, and Exhibit 20). Certain [fol. 95] other types of property, utilities and services are furnished to the plants by the Government without charge to the contractor (testimony, pages 194, 195, 199-204.)

20. Method of Reimbursing Costs. As provided in Article VI-C. Exhibit 1, the Government has advanced to Carbide and Carbon Chemicals Corporation from time to time sufficient monies with which to pay all of the costs incurred by Carbide and Carbon in the performance of the contract. The payment of Carbide's fee has not been made as a part of or from these advances, but is paid directly to Carbide by the Government. The advance of money originally made by the Government was placed in a special bank account upon which Carbide could draw to meet its costs. In order that a specified because would always be on hand on this account, a procedure was followed whereby Carbide and Carbon would pay for the materials, etc., going into the operations from this account, and in turn submit a voucher on the Government showing how much had been spent. The Government then reimbursed Carbide and Carbon by a like amount, which was in turn deposited to, the special bank account. For a description of the reimbursement procedure reference is made to the exhibits filed with the depositions in this case for the purchase of a Brann pulverizer from the Fisher Scientific Company. Carbide and Carbon prepared and placed the purchase order with the vendor (Exhibit 7). The vendor shipped the item ordered and invoiced Carbide and Carbon (Exhibit 8). On receipt, the equipment was checked and a receiving report prepared by an employee of Carbide and Carbon and approved by a representative of the Government (Exhibit 9). Carbide and Carbon then paid the vendor by . check drawn on the Hamilton National Bank of Knoxville against Carbide and Carbon's "contract account" (Exhibit 11), and submitted a voucher against the Government (Exhibit 12): When the amount shown on the youcher was paid to Carbide and Carbon, that sum was then deposited [fol. 96] in the "contract account" and used for subsequent purchases. .

21. The special bank account. The terms and conditions of the advances authorized by the contract are covered in Article VI-C, Exhibit 1. In brief, this article states that the Government may advance to Carbide sums not to exceed

50% of the estimated contract work, without interest. Until all such advances are liquidated, all sums received by Carbide, together with all funds received as reimbursements for contract costs and other revenues received under the contract are to be deposited in a member bank of the Federal Reserve System, or in an insured bank within the meaning of 12 USCA 264; and be maintained separate and distinct from the Carbide and Carbon Chemicals Corporation's own funds. The contract provides:

"Such special bank account or accounts shall be so designated as to indicate clearly to the bank their special character and purpose, and the balance in such account or accounts shall be used by the Contractor exclusively as a revolving fund for carrying out the purposes of the principal contract and any amendments thereto and not for other business of the Contractor."

22. It further provides that the balance on hand in the account shall secure the repayment of the advances, and that the Government shall have a lien upon such balances to secure the repayment, which lien shall be superior to any lien of the bank or any other person.

23. Checks may be drawn on this account by the Contractor, but upon notice by the Government to the Bank, the Carbide and Carbon Chemicals Corporation shall have no right to make further withdrawals. The Bank is required to act upon such notice and shall be under no liability to any party to the contract for any action taken in accordance with such notice.

[fot. 97] 24. On completion or termination of the contract for other than the fault of the contractor, the unliquidated balance of such advances shall be deducted from any payments otherwise due Carbide, and the excess of the unliquidated balance is to be returned to the Government. If the contract is terminated because of the fault of Carbide, the entire unliquidated balance of the advance must be returned to the Government without set-off. At any time during the performance of the contract, if the Government determines the amount in advance is in excess of Carbide's current needs under the contract, it may require Carbide to return the determined excess to the Government.

Section 25. Procurement of Property. In operating these wholly owned Government plants, Carbide and Carbon Chemicals

Corporation purchases a large volume of personal property, both in Tennessee and outside the state, for use in the plants or for the activities it carries on for the Commission. The requests for procurements, such as those involved in these cases and shown as Exhibits 3 through 12, and 13 through 18, originate with employees of the Company directly in charge of specific phases of operations. Orders for requested materials or supplies are placed by the Company through a standard purchase order form (Exhibit 7) and when for more than \$2,000, such purchase orders must be approved by a representative of the Government. When property purchased is received at the Warehouse, employees of Carbide and Carbon Chemicals Corporation inspect and accept the merchandise. Until October, 1948 the Government also made spot checks of materials being received, in which event a Government inspection sheet was prepared and the Government and Carbide and Carbon ; inspectors countersigned the two reports. Under present procedures, no spot check inspections are made by the Government, although the Government does inspect and approve Carbide and Carbon Chemical Corporation's methods [fol. 98] and organization for receiving and checking incoming materials. On acceptance of the materials by Carbide and Carbon, an appropriate marking is placed, burned, or stamped on the material (if of such a nature that it can be marked) to indicate that it is the property of the Government. The symbol used for this purpose by Carbide and Carbon Chemicals Corporation is the letters "USC & CCC', followed by a number and a prefix letter to show the plant for which the property is intended. The symbol and number placed on the property is assigned at the time the purchase order is prepared, and is affixed on the property at the time of inspection in the warehouse. marking of property was a requirement of the Army prior to the taking over of these plants by the Commission, and was continued thereafter by the Commission for the purpose of identifying the Government's property (testimony, p. 37-39). The Carbide and Carbon Chemicals Corporation prepares and maintains stock record cards (Exhibit 10) on property so received, and such cards are the records of the Government and the sole property record maintained . of materials purchased and used for the contract work. Carbide and Carbon Chemicals Corporation carries no insurance on the property it purchases, either while in transit . or after receipt.

26. The Carbide contract provides:

"Title to all materials, tools, machinery equipment and supplies for which the Contractor shall be entitled to reimbursement under Article VI-A shall vest in the Government at such point or points as the Contracting Officer may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided [fol. 99] further that, upon such final inspection; the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time." (Exhibit 1, Article VIII-A, par. 4, Supp. 8).

27. This provision of the Carbide contract, as previously stated with regard to Roane-Anderson contract, is standard form language used in many types of Government contracts, and its primary use was in situations where the property being procured had to pass through several contractors before delivery to the Government. In the performance of this contract, no point has been designated by the Government as the point at which title would pass (testimony, p. 36, 118), nor have any written acceptances of such property been made, other than the countersignature by a Government representative on the receiving reports preferred by Carbide and Carbon, as in the case of Roane-Anderson all such receiving reports were countersigned though the property referred to therein was not manually inspected.

28. Article VIII-D, par. 2 of the Carbide contract requires that the Company place contracts for the purchase of materials in its own name, and not bind, or purport to bind the Government. Carbide has included in all of its purchase orders a statement to this effect (Exhibit 7). Carbide's own obligation with respect to such procurement

is stated on these purchase orders as follows:

"Carbide and Carbon Chemical Corporation of only liability hereunder shall be to pay for materials or

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services ordered hereunder out of funds supplied by the United States Government under Contract W-7405-ENG-26, which has agreed under such contract to supply such funds."

[fol. 100] 29. Upon receipt and acceptance of property pruchased, the Carbide and Carbon Chemical Corporation's receiving warehouse delivers the property to the operating division or office of Carbide initiating the original request, or stockpiles the property for general use. Purchases of such items as coal are delivered directly to the coalyard, and thereafter used or consumed in the operation of the plants. At no time after passing through the receiving warehouse is such property inspected by the Government. As stated in the testimony, it was the intent of the Government and Carbide that title to all such property should pass directly from the vendor to the Government, and in fact it was the practice of the Government and Carbide to treat title to such property as having passed directly from the vendor to the Government (testimony pp. 36-39, 102, 140).

30. All Carbide and Carbon Chemical Corporation's procurements were originally shipped on or converted to Government Bills of Lading. While this practice has been discontinued, no changes have been made in the Carbide procurement forms and procedures followed in purchasing materials for these Government-owned plants. The purchases of coal by Carbide from the Diamond Coal Mining Company, shown as Exhibit 14, were converted from a commercial Bill of Lading to a Government Bill of Lading, and the cost of transportation paid by the Government to the

carrier (Exhibit 22, 23, 24, 23).

S. Frank Fowler, Solicitor for Complainants, 1412 Hamilton Bank Building, Knoxville, Tennessee.

July 21, 1950.

[fol. 101] IN THE CHANCERY COURT OF DAVIDSON COUNTY-

No. 65014

CARBIDE & CARBON CHEMICAL CORPORATION

VS.

SAM K. CARSON, COMMISSIONER

and

No. 65163

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON CHEMICAL CORPORATION

VS.

SAM K. CARSON, COMMISSIONER . 9

DEFENDANT'S REQUEST FOR FINDINGS OF FACT—Filed August 10-1950.

Comes the defendant James Clarence Evans, Commissioner of Finance and Taxation of Tenessee, in the above causes which have been consolidated for trial, and prays that the court make the collowing findings of fact:

1. That complainant Carbide and Carbon Chemical Corporation is a private, profit type New York corporation, domesticated in Tennessee, and is a cost-plus-fixed-fee contractor with the United States Atomic Energy Commission operating under contract W-7405-ENG-26 at Oak Ridge, Tennessee. The complainant Diamond Coal Mining Company is a private, profit type Delaware Corporation domesticated in Tennessee, and is a commercial firm which sold coal to the Carbide and Carbon Chemical Corporation for use by the latter in the performance of said contract with the Atomic Energy Commission.

2. The facts of these cases are developed from the allegations of the original bills which the answers thereto admit or fail to deny, the depositions taken and filed in the cause, the exhibits thereto, the stipulations of fact made by the parties, and from the public documents filed in the cause by complainants and the intervenors, and all such facts and [fol. 102] matters as the court is required to judicially take

knewledge of.

3. The complainant Carbide and Carbon Chemical Corporation entered into a contract with the United States of America on November 23, 1943, as an incident to the prosecution of World War II then in progress. The contract was designated by the parties as contract W-7405-ENG-26. ·Said contract was entered into pursuant to the War Powers Act, Public Law 354, 77th Congress, which authorized the President of the United States, for the better utilization of resources and industries, to authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, to enter into. contracts and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making of contracts generally, whenever the President deemed such action would facilitate the prosecution of the war. Said War Powers Act provided further that such contracts should be a matter of public record under regulations prescribed by the President. By Presidential Executive Order No. 9001, the President authorized the Army and Navy to enter into contracts necessary for the prosecution of the war, and in said Executive Order authorized the Army and Navy by Title 2, Section 4, of said Executive Order, to make advance payments to such contractors. The contract, and the amendments thereto through June 30, 1947, are Exhibits 1, 2 and 19 herein. The scope of the work contemplated under said contract was important at that time and remains important at this time in relation to matters of extremely grave concern to the national welfare and security defense. The complainant Carbide and Carbon Chemical Corporation promptly entered upon the performance of said contract, and has been engaged therein ever since.

[fol. 103] 4. The Act of Congress of August 2, 1946 (Publie Law 585-79th Congress, 42 USCA 1801, et seq.), known as the Atomic Energy Act of 1946, duly provides for the transfer of all properties, responsibilities, duties, rights, etc., from the Government's agency which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which the complainant Carbide and Carbon Chemical Corporation then and now maintains its offices and carries on its work under said contract.

- 5. The Governmental agency through which said work had been carrie on until the transfer to the Atomic Energy Commission was known as the Manhattan Engineer District of the United States Army Corps of Engineers. Acting pursuant to and in accordance with the provisions of said Act, the President of the United States duly issued Executive Order No. 9816, dated December 31, 1946, which transferred to and made the aforementioned contract, a contract between the Atomic Energy Commission, an agency of the United States of America, and the complainant Carbide and Carbon Chemical Corporation as of midnight, December 31, 1946.
- 6. As a necessary and integral part of the work under and in the course of action required by said contract, the complainant Carbide and Carbon Chemical Corporation has purchased property of the kind described as being taxable under the Tennessee Retailer's Sales Tax Act of 1947 and will continue to purchase such property in the performance of its contract.
- 7. The complainant Carbide and Carbon Chemical Corporation has paid Tennessee use taxes on the purchases of property for use under its contract with the Commission and [fol. 104] described as being subject to the use tax under said statute. It has also paid as a part of the purchase price of tangible personal property amounts equal to the tax levied against vendors of such property for the privilege of engaging in the business of making sales thereof in Tennessee. On October 15, 1947, complainant Carbide and Carbon paid to defendant Sam K. Carson, then Commissioner of Finance and Taxation of Tennessee, \$2,383.58, which sum was claimed by said defendant to be payable as the use tax on purchases by complainant Carbide and Carbon Chemical Corporation from out-of-state vendors for use under its contract with the Commission for the month of September. 1947. Said tax was paid under protest and involuntarily and suit to recover same was begun within the time provided by law. During November, 1947, the complainant Diamond Coal Mining Company in the course of business sold to complainant Carbide and Carbon, several thousand pounds of coal for a total sales price of \$109,550.31, which price included the sum of \$2,148.08; required to be added as a part of the sale price of said coal by the Tennessee Retailer's Sales Tax Act, the sales transaction taking place in Ten-

nessee when complainant Diamond Coal Mining Company paid the tax provided by the sales tax on its gross sales in Tennessee, it paid \$2,148.08 as a tax for the privilege of engaging in the business of making sales of coal to complainant Carbide and Carbon Chemical Corporation.: This amount was paid under protest and involuntarily on December 19, 1947, and suit to recover the same was commenced within the time prescribed by law.

8. All of the procurements of property by the complainant Carbide and Carbon Chemical Corporation asserted to be taxable by the defendant under said Tennessee Sales Tax Statute were purchased solely for use under its contract [fol. 105] with the Commission, and were obtained under, and handled through the same procedures and arrangements as the purchases of said complainant described in the to imony and the exhibits attached. The Carbide and Carbon Chemical Corporation procedures and forms are shown by Exhibits 3 through 12, and 13 through 18.

9. The Town of Oak Ridge was built for the sole purpose of housing workers necessary for the construction and operation of the Government's plants at Oak Ridge. The Government acquired by purchase or condemnation all of the land, some 59,000 acres, on which the city and the plants were built, although it did not take exclusive jurisdiction thereof. It is stipulated by the parties that all the buildings. on the land comprising the area known as the Clinton Engineering Works, including the Town of Oak Ridge, were built for the Government and belong to the Government. (p. 211, following depositions in Carbide case.)

10. By contract W-7405-ENG-26, as amended from time to time, the Carbide and Carbon Chemical Corporation contracted with the Government to make research, doing experimental work, to furnish consultant services, to train its own personnel to enable it to operate certain Government-owned plants, and to operate said Government-owned plants and to produce specified quantities of a material then referred to as K-25 but now commonly referred to as U-235. Said contract provides in part, with respect to his subject as follows:

TITLE V-Operation of Plant

"ARTICLE V-A-Statement of Work

"1. Prior to the placing of the Plant in readiness for operation in whole or in part, the Contractor shall perform all organization services in connection with the planning of, and the making of all necessary preparations for, operation of the Plant, and shall perform [fol. 106] all other services incident to setting up an efficient and going operating force.

- "2. When the Plant is ready for operation in whole or impart, the Contracting Officer shall notify the Contractor in writing. The Contractor shall thereupon proceed to exert its best efforts to maintain the Plant and to operate the Plant for the production of Product K-25 for the remaining period of this contract. During such period of operation, the Government shall have the right to require the Contractor to produce any amount of Product K-25 which Contractor by exerting its best efforts is able to produce with the then existing facilities of the Plant. The Contractor shall, if and to the extent requested by the Contracting Officer, rework material produced in the Plant which does not meet specifications.
- "4. In carrying out the work under this Title V, the Contractor is authorized to do all things necessary or convenient in and about the operation and closing down of the plant, or any part thereof, including (but not limited to) the employment of all persons engaged in the work hereunder (who shall-be subject to the control of and shall constitute employees of the Contractor).
- 5. The Government reserves the right, upon so. notifying the Contractor prior to any commitment by the latter therefor, to furnish any materials necessary for the operation of the Plant. In the operation of the Plant, the Contractor shall be free (but shall not be obligated) to use any materials of its own manufacture upon advising the Government in advance as to the. price at which and the conditions wupon which such materials will be supplied. In the event the Government is able to obtain material of equal quality and [fol. 107] quantity at a lower price or on more favorable conditions from any reasonable competitive source or from its own manufacture, it may undertake to do so upon informing the Contractor within ten (10) days after being advised of the Contractor's price for such material.

"6. The work shall be executed in the best and most workmanlike manner by qualified, careful and efficient workers, in strict conformity with the best standard practices."

(Title V-Article V-A)

11. As of July 1, 1947, and continuously from that date, complainant Carbide and Carbon Chemical Corporation has operated all of the Government-owned plants and facilities located at Oak Ridge, namely the K-25 plant and the Y-12 plant, producing specified quantities of U-235. Since March 1, 1948, Carbide and Carbon has also operated the Oak Ridge National Laboratory. All of said operations have been pursuant to the written specifications and provisions

of the contract between the parties.

12. The contract under which these operations are carried on is an independent contractor contract whereby Carbide and Carbon Chemical Corporation contracts to provide the personnel and technical experience, and to produce specified quantities of fissionable material, while the Government provides the facilities and the money necessary to said operation. By an Act of Congress, the President of the United States fixes the amount of fissionable material to be manufactured annually, and Carbide and Carbon, under its contract, undertakes to produce the portion of said output which is allotted to it. All plant operations are carried on by and are under the control of Carbide and Carbon Chemical Corporation, subject to and in accordance with the contract with the United States. Said contract has been [fol. 108] characterized by Carroll L. Wilson, General Manager, Atomic Energy Commission, in a statement submitted to the Congressional Committee on Atomic Energy on Thursday, February 17, 1949, as follows:

"The joint committee has requested that a part of this afternoon's hearing be devoted to a discussion of the Commission's contract procedures and practices. The Commission welcomes this opportunity for such a discussion. As you know, we have from time to time. in our reports to the Congress as well as in other published statements, referred to the central role which contractors occupy in the atomic energy program. We believe that it is important for the public generally and for the American business to know and to understand the policies which we are following.

"It will be helpful, I think, to begin by stating in somewhat general terms the Commission's view on the manner in which a major part of its business should be conducted.

"The Atomic Energy Act of 1946 left it to the Commission to determine, in the light of experience and prevailing circumstances in each case, whether its installation should be directly operated by the Commission or whether they should be operated by private contracts or organizations in accordance with the practice which had been initiated by the Manhattan District:

"The Commission has been of the view and we believe this view is amply supported by our two years of experience since we succeeded to the responsibility of the atomic energy enterprise that we should develop as fully as possible the method of operating through contractual relations with private organizations. We have recognized that the high relative significance of [fol. 109] weapon production and the necessary secrecy of large parts of the atomic energy program involve the danger that only limited scientific, technical, and managerial resource will be available to this most urgent new atomic enterprise. Such handicaps must be minimized and overcome if this country's rapid progress in the field of atomic energy is to be assured. Accordingly, the Commission has looked to the basis policy of contractor operation as a menas of developing wide and alert participation in the program by a growing number of private organizations, both academic and industrial.

"By pursuing a basic policy of obtaining contractoroperators the Commission has been able to draw upon the technical and administrative talents of a broad section of the American economy. Operation of our plants and laboratories through established independent contractors not only gives to the atomic energy program substantial benefits from accumulated experience and established facilities; it also enlists the interest and the support of industry and universities for future private development. It has been our conviction that if atomic energy is to become a generic part of the American scene it should have its roots deep in the institutions which are so productive a part of American

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progress in science and technology. The identities of the contractor-operators at the Commission's major facilities are of course well known to the members of the joint committee. At Oak Ridge the production and the laboratory facilities are operated by the Carbide and Carbon Chemical Corporation, while the Roane-Anderson Co. is the principal contractor for town operations." (P. 47 of "Los Alamos Retrocession Bill and AEC Contract Policy Hearings Before the Joint Committee on Atomic Energy, Congress of the United States, Eighty-First Congress, First Session of Los Alamos Retrocession Bill and AEC Contract Policy, [fol. 110] February 17, 21, and 24, 1949.")

13. Although the basic facilities for the manufacture of K-25 are provided by the Government, and supplies of uranism and certain other materials are furnished from time to time by the Government, the operation of these plants by Carbide and Carbon includes the securing or purchasing by Carbide and Carbon, in its own name, of all the labor, tools, machinery, equipment, supplies, and servides needed to perform the work contracted to be done.

14. By this contract the Government agreed to pay Carbide and Carbon its cost of the work plus a fixed fee based on the estimated cost at the time the contract was entered into (Exhibit 1, Article V, and VI). The fixed-fee is subject to increase or decrease owing to such changes as the Government might require in the contract, but is not subject to any adjustment in case the actual costs vary from the estimated cost. The contract provides that Carbide and Carbon shall do all the work at the expense of the Government; that Carbide and Carbon shall be held harmless against any loss or damage occurring unless due to wilful misconduct or bad faith of the Company's officers (Exhibit 1, Article VIII-A, Supplement 19); and that Carbide and Carbon is under no obligation to pay any of its own funds in the performance of the contract (Exhibit I, Article VI-D). Carbide and Carbon has not used any of its own funds in the performance of this contract (testimony, p. 100), and all of the costs thereof have been paid from monies advanced by the Government for that purpose (Exhibit 1, Article VI-C), or from revenues received by Carbide and Carbon Chemical Corporation for the Government's account and used in reducing the cost of the work (Exhibit 1, Article V, Section 5, and Article IX.)

- 15. Title to purchased materials for which Carbide and Carbon is entitled to reimbursement vest in accordance with. [fol. 111] the contract (Exhibit 1, Article VIII-A, Section 4, Supplement 8). Said contract provision is as follows:
- "4. Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to reimbursement under Article VI-A shall vest in the Government at such point or points as the Contracting Officer may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that, upon such final inspection the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time."
 - 16. Article VIII-D, Section 3 of Exhibit 1, provides?
 - "3. Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of two thousand dollars (\$2,000.00) finade by it for the purpose of the work hereunder for services (except for electric power, which contract shall be in the name of the Government, not the Contractor,) materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer therewoder. No purchases in excess of two thousand do"ars (\$2,000.00) shall be made or placed without the approval of the Contracting Officer."
- 17. The contract further provides that salaries and expenses of Carbide and Carbon employees to be reimbursable under the contract, must be according to an approved schedule and key personnel may not be employed without prior [fol. 112] approval of the Government (Exhibit 1, Article VI-A, Exhibit 19). The Government may require Carbide and Carbon to dismiss from the contract work any employee whom the Government deems to be incompetent, careless, insubordinate, or whose continued employment is con-

sidered inimical to the public interest (Exhibit 1, Article VIII-D). All labor disputes, or threatened disputes, must be brought to the attention of the Government (Exhibit 1, Article VIII-N). All patentable discoveries made by Carbide and Carbon or its employees in the performance of the contract must be reported to the Government, which will determine whether same will be patented, and the disposition of title in any rights under any petent which may result (Exhibit 1, Article VIII-R). Government contracts to hold Carbide and Carbon harmless for patent infringe-All technical data, notes, drawings, designs, and specifications prepared by Carbide and Carbon in the performance of the contract become the property of the Government, and will be delivered over to the Government whenever requested (Exhibit 1, Article VIII-Y). The contract provides for the payment of employee benefits for death or injury due to certain hazards peculiar to the Atomic Energy program, when approved by the Government (Exhibit 1, Article VIII-BB, Supplement 22.)

18. The raw material for use by the Contractor is procured and furnished by the Government. The contract provision covering this subject, found in Title VIII, Article

VIII-V, reads as follows:

"Article VIII-V. (a) 'The Government shall deliver to the contractor at the plant for use in the manufacture of Product K-25 all raw materials needed for such manufacture, without cost to the Contractor.' "

19. Payments. The subject of payment under the contract is covered by Article VI-B of Title VI of the contract. This article provides in substance that the Government will [fol. 113] currently reimburse the contractor for expenditures upon certification to and verification by the Contracting Officer of the original signed payrolls for labor, the receipted invoices for materials, and such other documents as the Contracting Officer may require. Provision is made to pay the fixed fee in monthly installments. It is provided that if the bills for the purchase of materials, machinery or equipment or payrolls are not paid promptly by the contractor or the subcontractor, as the case may be, the Contracting Officer may in its discretion withhold from payments otherwise due amounts equivalent to the amounts of such unpaid items. Said Article provides by Section 4,

thereof that upon completion of the work to be performed under the contract and its final acceptance in writing by the Contracting Officer, that the Government shall pay the contractor the unpaid balance of the cost of the work and the balance of the fixed fee, less any sum necessary to settle claims against the contractor. Said contract provides: "The Contracting Officer shall accept the completed work hereunder with reasonable promptness."

20. Advance Payments. The subject of advance payments by the Government to the Contractor is dealt with by contract Article VI-C. This Article authorizes the Government at the request of the contractor to make advance payments to the contractor, within certain limitations expressed in said Article. This provision for advance payments was authorized by the first War Powers Act 1941 (Public Law 354—77th Congress) in the following language:

"Sec. 201. The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the Presi-[fol. 114] dent for the protection of the interest of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law-relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war.

(Title II, Contracts, Sec. 201.) (Public Law 354-77th Congress, First Session.)

The first provisions for the making of advance payments was by supplemental contract, dated 18th day of January, 1943, to the letter contract of the same date whereby Carbide and Carbon and the United States Government first entered into contractual relationship with respect to the operations at Oak Ridge. There is nothing about this provision for advance payments and the method of accounting for such advance payments which indicates that it is different from the contract method employed by the War De-

partment in the case of other cost-plus-a-fixed-fee contractors with the War Department. And, the fact that the provision for advance payments in this contract is made pursuant to the same statutory authorization which permits advance payments to be made in all war prosecution contracts indicates that the legal effect of such a contract provision in one case is no different from what it would be in any other case. Said Article VI-C, Advance Payments, provides in addition to the provision just referred to, as follows: That the Contract may be required to furnish security for the advance payments; that such advance payments shall be deposited in a special bank account at a member bank of the Federal Reserve System or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation; that said funds be kepts separate from the contractor's own or other junds; that the bank account be designated so as to indicate to the bank [fol. 115] its special character; that the balance in the account is to be used by the contractor as a revolving fund for carrying out the contract and not for the contractor's other business: that the balance on deposit shall secure the repayment of the advances made and the Government to have a lien upon such balance to secure the repayment of such advances; provided that the bank, upon receipt of notice from the contracting party shall act on such notice and desist in making payments from said account; that if the aggregate of the advance payments made, together with. funds paid as reimbursement shall exceed the total estimated cost of the work under the contract, such excess shall immediately be paid by the contractor to the Government, or if any reimbursement is due from the Government to the contractor, such excess shall be deducted therefrom. Said Article contains other provisions which are applicable upon completion of the contract or upon termination thereof which it is not necessary to refer to here. Notice, however, should be taken to Section 7 of Article VI-C which authorizes the contractor, with the approval of the Contracting Officer, to make advance payments to subcontractors and material men on the same terms and conditions applicable to the advance payments to Carbide and Carbon Chemical Corporation. The Complainant Carbide and Carbon and the Government have followed the procedure prescribed by statute with respect to such advance payments, except that

it does not appear from the record whether security for such . advance payments has been furnished by Carbide and Carbon. In order that a specific balance should always be on hand in the special account, a procedure was followed whereby Carbide and Carbon would pay for materials, etc., from this account and in turn submit a voucher to the Government showing how much had been spent, whereupon the [fol. 116] Government would reimburse Carbide and Carbon by a like amount, which in turn would be deposited to the special bank account. For a description of the reimbursement procedure, reference is made to the exhibits filed with the depositions in this case for the purchase of a Braun pulverizer from the Fisher Scientific Company. Carbide and Carbon prepared and placed the purchase order with the vendor (Exhibit 7). The vendor shipped the item ordered and invoiced Carbide and Carbon (Exhibit 8). On receipt, the equipment was checked and a receiving report prepared by an employee of Carbide and Carbon and approved by a representative of the Government (Exhibit 9). Carbide and Carbon then paid the vendor by check drawn on the Hamilton National Bank of Knoxville against Carhide and Carbon's "contract account" (Exhibit 11), and submitted a voucher against the Government (Exhibit 12). When the amount shown on the voucher was paid to Carbide and Carbon, that sum was then deposited in the "contract account" and used for subsequent purchases.

21. Procurement of Property. In doing the work contracted to be done, Carbide and Carbon purchases a large volume of tangible personal property both in and outside of Tennessee. Requests for procurements, such as those involved in these cases and shown as Exhibits 3 through 12, and 13 through 18, originate with employees of the Company directly in charge of specific phases of operations. Orders for requested materials or supplies are placed by the Company through a standard purchase order form (Exhibit 7) and when for more then \$2,000, such purchase orders must be approved by a representative of the Government. When property purchased is received at the warehouse, employees of Carbide and Carbon Chemical Corporation inspect and accept the merchandise. Until October, 1948 the Government also made spot checks of materials being received-in which event a Government inspection sheet was prepared, and the Government and Carbide and Carbon inspectors

[fol. 117] countersigned the two reports. Under present procedures no spot check inspections are made by the Government, although the Government does inspect and approve Carbide and Carbon Chemical Corporation's methods and organization for receiving and checking incoming materials. On acceptance of the materials by Carbide and Carbon, an appropriate marking is placed, burned or stampel on the material (if of such a nature that it can be marked) to indicate that it is the property of the Government in the possession of Carbide and Carbon under its contract. symbol used for this purpose by Carbide and Carbon Chemical Corporation is the letters "USC & CCC", followed by a number and a prefix letter to show the plant for which the property is intended. The symbol and number placed on the property is assigned at the time the purchase order is prepared, and is affixed on the property at the time of inspection in the warehouse. This marking of property was a Prequirement of the Army prior to the taking over of these plants by the Commission, and was continued thereafter by the Commission for the purpose of identifying the Government's property (testimony, p. 37-39). The Carbide and Carbon Chemical Corporation prepares and maintains stock record cards (Exhibit 10) on the property so received, and such cards are the records of the Government and the sole property record maintained of materials purchased and used for the contract work. Carbide and Carbon Chemical Corporation carries no insurance on the property it purchases, either while in transit or after receipt.

22. With returence to Article VIII-A, Section 4, Supplement 8, which has already been set forth verbatim in Section 15, page 11 hereof, it appears that the Government has not designated any point at which title shall vest in the Government, nor has the Government through the Contracting [fol. 118] Officer ever designated in writing any final acceptance of rejection of materials, tools, machinery, equipment and supplies purchased by the contractor, other than the countersignature of a Government representative on the receiving reports prepared by Carbide and Carbon Chemicals Corporation, which countersignatures were Let placed on said reports with the intention of complying with Article VIII-A, Section 4, Supplement 8.

23. Article VIII-D, Section 3 provides as follows:

Contracting Officer, reduce to writing every contract in excess of two thousand dollars (\$2,000.00) made by it for the purpose of the work hereunder for services (except for electric power, which contract shall be in the name of the Government, not the Contracted), materials, supplies, machinery, or equipment, or for the use thereof, insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchase in excess of two thousand dollars (\$2,000.00) shall be made or placed without approval of the Contracting Officer."

Pursuant to said contract provision the purchase order form used by Carbide and Carbon contains the following language.

"This Order is placed for the benefit of, and is assignable to, the United States Government. Carbide and Carbon Chemical Corporation's only fiability hereunder shall be to pay for material or services ordered hereunder out of funds supplied by the United States Government under Contract S-7405-ENG-26, which has agreed under such contract — supply such funds. In the event of assignment to and acceptance by the Gov-[fol. 119] ernment for payment under this Order. This Order does not bind or purport to bind the United States Government."

(Carbide and Carbon, Exhibit #7.)

24. Upon receipt and acceptance of property parchased, the Carbide and Carben Chemica! Corporation's receiving warehouse delivers the property to the operating division or office of Carbide initiating the original request, or stockpiles the property for general use. Purchases of such items as coal are delivered directly to the coalyard, and thereafter used or consumed in the operation of the plants. At no time after passing through the receiving warehouse is such property inspected by the Government. The intent of the Government and Carbide and Carbon with respect

to the title to all such property is expressed in the contract and evidence of witnesses to the contrary, while considered by the Court, is not deemed to be controlling. Under the contract, title vests on purchase and delivery in Carbide and Carbon Chemical Corporation which purchases the materials and supplies in its own name with funds paid to it by the Government as advance payments on the contract.

25. From December, 1942 until October, 1946, all of the materials, supplies and machinery purchased by Carbide and Carbon Chemical Corporation were shipped on an ordinary bill of lading, in order that land grant freight rates might be made applicable to such shipments. In October, 1946 by Act of Congress, land grant freight rates were abolished. From October, 1946 until May 12, 1948, the practice of converting to Government bills of lading was continued for the purpose of avoiding the 3% Federal transportation tax. After May, 1948 there was no conversion to Government bills of lading except when the shipment was to the Government on a Government purchase order, and Carbide and Carbon pays 3% Federal transportation tax on all shipments to it.

[fol. 120] 26. Term and Termination of Contract. Title VII covers the term of the contract and sets forth provisions for the termination of the same. The term of the contract as originally entered into was for a period commencing January 18, 1943, and ending six months after the termination of hostilities with the Axis Powers. Power to terminate at any time was reserved to the Government. The term of the contract has been extended from time to time by supplemental agreements thereto, all of which are set forth in the supplement exhibited to the contract (Exhibit 1). Section 2 of Title VII provides:

"2. If this contract is terminated by the Government for the fault of the contractor, the Contracting Officer may enter upon the site of the plant and take possession, for the purpose of completing the work contemplated by this contract, of any or all materials, tools, machinery, equipment and appliances at the site of the Plant which may be owned by or in the possession of the Contractor and all options, privileges, and rights, and may complete or employ any other person or persons to complete said work."

- 27. Title VIII of the contract, which covers general provisions applying to the whole of the contract, contains among other things, a provision covering "Records and Accounts, Inspection and Audit." Section 1 under Article VIII-C provides as follows:
 - "1. The Contractor agrees to keep records and books of account showing the actual cost to it of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature for which reimbursement is authorized under the provisions of this contract. The system of accounting to be employed by the Contractor shall be such as is satisfactory to the Contracting Officer.
 - [fol. 121] "2. The Contracting Officer shall at all times be afforded proper facilities for inspection of the work and of the special bank account or accounts provided for in Article VI-C hereof, and shall at all times have access to the premises, work, and materials, to all books, records, correspondence, instructions, plans, drawings, receipts, vouchers and memorandum of every description of the Contractor pertaining to said work; and the contractor shall, except such original and other documents as are submitted in support of reimbursement vouchers, preserve for a period of three (3) years after completion or termination of this contract, all the books, records and other papers herein mentioned.
- 28. Special Requirements. Article VIII-D, of Title 8 sets forth certain special requirements made of the contractor. Section 2 of Article VIII-D reads as follows:
 - "2. Procure all necessary permits and licenses; obey and abide by all applicable laws, regulations and ordinances and other rules of the United States of America, of the state, territory or subdivision thereof wherein the work is done, or of any other duly constituted public authority."
- 29. Although the purchase order provides that the same is assignable to the United States Government, by a provision thereof which is set forth in full in Item 23 hereof, assignment of such purchase orders has never been made,

nor has the property acquired under the orders been

30. The Atomic Energy Commission, although authoro ized to do so by Section 9(b) of the Atomic Energy Act, has never made any payments to the state and local gov-

ernments in lieu of property taxes.

[fol. 122] 31. The contracts provide that the Government can furnish materials and supplies and pay for them or the . contractors can make purchases and the Government will reimburse the contractors. In the transactions involved herein the contractors made the purchases. Uniformly, the contracts extered into by the contractors for the purchase of materials provided that they are "assignable to the United States Government."

32. The proof indicates that the details of making purchases and transferring personal property to the Government has not always been carried out as provided in the contracts. Nevertheless, the relationship and rights of the parties are determined by the provisions of the contracts and not by the unauthorize I acts of their employees.

33. All purchases involved herein were made by the respective contractors and and for by them from bank accounts maintained by them as required by these contracts. It is true the money was furnished by the United States Government, but this was done pursuant to the provisions

of the contracts.

34. With further reference to Article VIII-A, Section 4, Supplement 8 of the contract, which has heretofore been set forth in Item 15 of this finding of fact, no point has, ever been designated by the Government as the point at which title passes, nor has any written notice of acceptance or rejection, as the case may be, been given by the Contracting Officer, with respect to the materials, tools, machinery, equipment and supplies which the contractor purchases, as contemplated by said Article VIII-A, Section 4, Supplement 8.

> Allison B. Humphreys, Jr., Advocate General, Solicitor for Defendant.

[fol. 123] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65014

CARBIDE AND CARBON CHEMICAL CORPORATION

VS.

SAM K. CARSON, Commissioner

and

No. 65163

DIAMOND COAL MINING COMPANY and CARBIDE AND CARBON CHEMICAL CORPORATION

VS.

Sam K. Carson, Commissioner

Decree-August 17, 1950

This cause was heard on the 17th day of August, 1950 before Alfred T. Adams, Special Chancellor, upon the entire record and more particularly upon the motion of complainants and defendant for the Court to make findings of fact and the written request for findings of fact filed herein on July 21, 1950, by complainants and the written request for findings of fact filed herein on August 10, 1950 by the defendant, from the consideration of all of which the Court doth order, adjudge and decree that it adopts as its findings of fact the findings of fact as set forth in the written request filed herein by the defendant on August 10, 1950, and it is further ordered by the Court that said findings of fact be made a part of this decree.

Alfred T. Adams, Special Chancellor.

[fol 124] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65014

CARBIDE & CARBON CHEMICAL CORPORATION

VS.

SAM K. CARSON, Commissioner, etc.

FINAL DECREE-August 29, 1950

Be it remembered that this cause came on to be heard on the 29th day of August, 1950, and former days before Alfred T. Adams, Special Chancellor, sitting by election of the Bar of Davidson County, Tennessee, in the place and stead of Honorable William J. Wade, Chancellor, who was unable to attend court on account of illness, on the original bill and the exhibits thereto, including Contract No. W-7405-ENG-26, dated November 23, 1943, entered into between complainant Carbide and Carbon Chemical Corporation and the United States of America, together with all amendments to said contract through the 12th day of September 1949; the answer of defendant; the depositions of witnesses and exhibits thereto; the intervening petition of the United States of America; and the entire record in said cause and upon consideration of all of which the Court finds, in addition to certain other findings of fact heretofore made, as follows:

That the contract No. W-7405-ENG-26, entered into between complainant Carbide and Carbon Chemical Corporation and the United States of America on November 23, 1943, together with all the amendments thereto, is an independent contractor of the cost-plus-a-fixed-fee type and created the relationship of employer and independent contractor between the United States of America and complainant Carbide and Carbon Chemical Corporation. the character of the relationship was not changed by Executive Order #9816 of the United States effective Decem-[fol. 125] ber 31, 1946, whereby the supervision of the discharge of said contract was transferred to the Atomic Energy Commission. That, as an independent contractor with the United States of America, whose contract is under the supervision of the Atomic Energy Commission, complainant is not exempt from the Use Tax levied by Chapter 3 of the Public Acts of the General Assembly of Tennessee

for the year 1947 by reason of implied constitutional immunity of Federal Agencies nor for any of the reasons claimed in the original bill. That Section 9(b) of the Atomic Energy Act of 1946, as amended, does not exempt. complainant from the payment of the Use Tax levied by Chapter 3 of the Public Acts of the General Assembly of Tennessee for the year 1947. That the allegations of the original bill are fully met and overcome by the defenses raised by the answer and established at the hearing, and the original bill should be dismissed at the cost of the complainant. That the intervening petition of the intervenor, the United States of America, which has been fully considered, should, likewise, be dismissed but without cost to the intervenor.

It is accordingly ordered, adjudged and decreed for the reasons stated in the opinion of the Court filed herein and authenticated by the signature of the Special Chancellor, which is ordered made a part of the record herein and on the findings of fact made by the Court, that complainant's original bill be and the same is hereby dismissed at the cost of complainant, for which execution may issue. intervening petition of the intervenor United States of America, is likewise dismissed but without cost.

· The copies of the public documents here listed which were delivered to the Court by complainant of which judicial notice was taken, are ordered filed and made a part of the record.

[fol. 126] Hearings before the Committee on Military Affairs-House of Representatives-Seventy-Ninth Congress, First Session on H. R. 4280, October 9 and 18, 1945.

Hearings before the Special Committee on Atomic Energy United States Senate-Seventy-Ninth Congress First Session pursuant to S. Res. 179, Parts 1 and 3.

Hearing before the Joint Committee on Atomic Energy-Congress of the United States-Eighty-First Congress, First Session on Los Alamos Retrocession Bill and AEC Contract Policy.

Senate Document No. 96-80th Congress, 1st Session. Letter from the Chairman and Members of the United States Atomic Energy Commission.

Report No. 1211-79th Congress, 2nd Session, Senate. Atomic Energy Act of 1946.

Report No. 1186, 79th Congress, 1st Session—House of Representatives—Atomic Energy Act of 1945, and Part 2 of Report No. 1186.

To the action of the Court in dismissing complainant's original bill and taxing it with the cost, and in dismissing the intervening petition of the United States of America, and to the findings of fact made, and all adverse action taken, both complainant and the intervenor except and pray an appeal to the next term of the Supreme Court of Tennessee sitting at Nashville, which appeal is granted to the [fol. 127] intervenor United States of America, without condition, but is granted to the complainant Carbide and Carbon Chemical Corporation only on condition that within thirty days it execute and file with the Clerk and Master an appeal bond in the amount of \$250.00, conditioned as provided by law. It is ordered that all exhibits on file in this cause, including the public documents listed above, shall be sent up to the Supreme Court in original form in event appeal is perfected.

Enter: Alfred T. Adams, Special Chancellor.

[fol. 128] Bond on Appeal for \$250.00 omitted in printing.

No. 65163

DIAMOND COAL MINING COMPANY, a Delaware Corporation Qualified to Do Business in the State of Tennessee, and Carbide and Carbon Chemical Corporation, a New York Corporation, Qualified to Do Business in the State of Tennessee, Complainants,

SAM K. CARSON, Commissioner of Finance and Taxation of the State of Tennessee with Office at Nashville, Tennessee, and Individually a Citizen and Resident of Davidson County, Tennessee, Defendant

ORIGINAL BILL-Filed January 19, 1948

The complainants Diamond Coal Mining Company and Carbide and Carbon Chemical Corporation show to the Court the following facts:

The complainant Diamond Coal Mining Company is a corporation duly organized and existing under the laws of the State of Delaware and qualified under the laws of the State of Tennessee to do business within the latter State; and doing business therein with its principal office in Campbell County, Tennessee.

The complainant Carbide and Carbon Chemical Corporation is a corporation duly organized and existing under the laws of the State of New York and qualified under the laws of the State of Tennessee to do business within the latter State and doing business therein with its principal office in

Roane County, Tennessee.

The defendant m K. Carson is the duly appointed and acting Commissioner of Finance and Taxation of the State [fol. 130] of Tennessee and as such was and is charged with the collection of all taxes under the Act of the General Assembly of the State of Tennessee known generally as Tennessee Retailer's Sales Tax, being Chapter No. 3 of the Public Acts of the year 1947 of the General Assembly of Tennessee; and said defendant promptly entered upon the discharge of his responsibility as collecting officer under said Act and the payments hereinafter described were made. to him and received by him in his said capacity.

This is a suit brought to recover certain amounts asserted by said defendant to be due from the complainants under the said Tennessee statutes, which amounts the defendant compelled the complainant Diamond Coal Mining Company to pay, although requirement of payment thereof was illegal, complainants not being hable for said tax. The said statute requires the tax to be paid by the 20th day of each month, and this suit is brought for the further purpose of obtaining the adjudication of this Court that said statute and the tax levied thereby do not apply to the complainants in respect to transactions hereinafter described, so that in the future it shall not be necessary for the complainants to bring a suit each month in order to protect their rights.

II

On November 23, 1943, the complainant Carbide and Carbon Chemical Corporation entered into a contract with the United States of America being Contract No. W-7405-ENG-26. Said contract was entered into by the United States Government as an incident to the prosecution of World War Two then in progress; the scope of the action contemplated under said contract was so important at that time and remains so important at this time, in relation to matters of extremely grave concern the national welfare. security and defense, that the said complainant cannot exhibit to the Court the whole of said contract. Such inability [fol. 131] is due to the express forbidding of such disclosure by the duly constituted officers of the United States of America. Complainants file herewith as Exhibit "A", and by such reference the same is made a part hereof, a full and securate copy of all of such portions of the contract as bear upon the questions which will be presented to this Honorable Court in this bill of complaint. For the performance of this contract the complainant Carbide and Carbon Chemical Corporation is paid a fee, the amount of which is fixed in accordance with a formula which the United States Government does not permit the complainant to release. Purchases made by the said complainant pursuant

Exhibit "A" consisted of excerpts lifted from the contract, which was a classified document. Later the contract was largely declassified and is included in Carbide Exhibit 1, to which refer.

to the said contract are financed initially by funds of the United States of America entrusted to the complainant for that purpose.

III

Complainant Carbide and Carbon Chemical Corporation promptly entered apon the performance of the said contract, portions of which are exhibited herewith, and has ever since been engaged therein and is so engaged at the present time.

IV

The Act of Congress of the United States known as the "Atomic Energy Act of 1946" (42 USCA 1801, et seq.) which became a law in the latter part of the year 1946, duly provides for the transfer of all properties, responsibilities, duties, rights, et cetera, from the Governmental instrumentality which had exercised jurisdiction over and supervision of the operation of the area within Roane and Anderson Counties, Tennessee, known as the Clinton Engineer Works. The governmental instrumentality through which said work had been carried on until the transfer to the Atomic Energy Commission was known as Manhattan Engineer District. It is in said area that the complainant [fol. 132] Carbide and Carbon Chemical Corporation maintains its Tennessee offices and carries on its Tennessee work under said contract.

The full transfer of properties, authorities, rights, obligations, etc., of the Manhattan Engineer District to the Commission created under the Atomic Energy Act of 1946 is provided for and directed by said Act of Congress. Acting pursuant to and in full discharge of the provision of said Act relating thereto the President of the United States has duly issued Executive Order No. 9816 dated December 31, 1946, which has brought about the full transfer intended by Congress under the terms of said Act. Pursuant to and as a result of the said executive order of the President the contract dated November 23, 1943 above referred to became a contract between the Atomic Energy Commission, an instrumentality of the United States of America, and the complainant Carbide and Carbon Chemical Corporation, and this change occurred as of midnight December 31, 1946.

As a necessary and integral part of the work performed under and course of action required by said contract with the Atomic Energy Commission, all of which work and action was and is an essential and an integral part of the activities of the Atomic Eenergy Commission in the interest of national welfare, security and defense, the complainant Carbide and Carbon Chemical Corporation has continuously purchased property of the kind which is described as being taxable under the said Tennessee Retailer's Sales Tax Act of 1947, and will continue to purchase such property in the performance of said contract. The number of such purchases which have been made by the said complainant since the effective date of said Act has been very considerable and it would unduly lengthen this bill and tax the patience of the Court, and it is wholly unnecessary to enumerate and specifically describe each of the purchases which have been asserted by the defendant to entitle him to collect the tax. [fol. 133] All of the properties so purchased and to be purchased by the said complainant under its said contract have been of will be used by the United States and this complainant in the performance of the activities of the Atomic Energy Commission and pursuant to the terms of the contract hereinabove mentioned.

During the month of November 1947, the complainant Diamond Coal Company sold to the complainant Carbide and Carbon Chemical Corporation several thousand tons of coal which were delivered to the latter complainant in the said area known as the Clinton Engineer Works. The totals consideration paid for said coal was \$107,402.32. Said coal came within the description of property above set forth which has been, is being and will be acquired and used by the complainant Carbide and Carbon Chemical Corporation under its said contract with the Atomic Energy Commission and the averments above made with respect to such property are true with respect to the coal thus sold and delivered during the month of November, 1947. Said averments are likewise true with respect to previous sales of goal made by the Diamond Coal Mining Company to the Carbide and Carbon Chemical Corporation, and also with respect to future sales of such coal, used or to be used by Carbide and

Carbon Chemical Corporation at the plant operated by it in the Clinton Engineer Works area. Said sale price of \$107,402.32 was paid by complainant Carbide and Carbon Chemical Corporation to the Diamond Coal Mining Company togehter with the sum of \$2,148.08 representing the tax claimed to be due thereon by the defendant, which tax was paid by the former to the latter as directed by the Sales Tax Act.

VII

On December 19, 1947, the complainant Diamond Coal Mining Company having collected said tax from the other complainant hereto, paid the defendant said sum of \$2,148.08 and said sum was paid to the defendant by reason of the position taken by him as to the applicability of the pro[fol. 134] visions of the said Tennessee Retailer's Sales Tax Act to the complainants and to the sale transactions described above.

All of said purchases of coal were handled by the complainants in conformity with the same procedure and under the same arrangement in the case of each transaction. Each of said purchases were consummated through the use of forms and under the express provisions of and according to the procedure shown by Exhibit "B" filed herewith and made a part hereof, which are actual photostated copies of the original records in the possession of Carbide and Carbon Chemical Corporation, the pages of which are as follows:

Page 1. Said complainant's purchase requisition No.

Page 2 Said complainant's purchase order No. WEX33741.

Page 3. Reverse side of page 2 of Exhibit B.

Page 4. Standard form of invoice being invoice No. 1690. (Said sales during the month of November 1947 were also govered by other invoices which are not executed so as not to encumber the record.)

Page 5. Said complainant's receiving report No. 129688, Bearing signature of said complainant's receiving officer and also bearing the approval of a representative of the Atomic Energy Commission.

Exhibit "B" consists of Carbide Exhibits 13, 14, 15, 16, 17, and 18, to which please refer.

Page 6. Complainant Carbide and Carbon Chemical Corporation's check No. 61624 in payment for the property purchased.

Page 7. Explanatory statement attached to said

check.

Page 8. First page of Voucher No. 40 13169 submitted by complainant Carbide and Carbon Chemical Corporation to the United States.

Page 9. Reverse side if page 8 of Exhibit B.
Page 10. Second page of Voucher No. 40 13169.
Page 11. Third page of Voucher No. 40 13169.

By check No. 102231 the United States of America reimbursed the fund in the complainant Carbide and Carbon Chemical Corporation's possession for its expenditures made as aforesaid and which appear in the voucher sub[fol. 135] mitted by the complainant Carbide and Carbon Chemical Corporation and appearing hereto as pages 8, 9,

10 and 11 of Exhibit "B".

Complainants aver that in each and every instance wherein the complainant Carbide and Carbon Chemical Corporation purchased property from vendors within the State of Tennessee as well as vendors without the State of Tennessee the title thereto became vested in the United States of America at the moment that title passed from the vendor. This was true of all purchases from its co-complainant. Under Article VIII' paragraph 4 of the contract dated November 23, 1943 it is provided in part as follows:

"Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to reimbursement under Article VI-A shall vest in the Government at such point or points as the Contracting Officer may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be."

Complainants aver that the uniform and unvarying practice and custom of complainant Carbide and Carbon Chemical Corporation and the Atomic Energy Commission in the performance of their said contract was that title to all procurements vested in the United States of America at the moment of acquisition from the vendor, and from that moment, in every instance of a purchase, the property was treated as being the property of the United States Government. No insurance for the protection of such purchased property was taken out, in accordance with the policy of the United States Government which dispenses with insurance [fol. 136] on Government property. The risk of loss of the property rested at all times upon the United States Government and not upon the complainant.

Said Exhibit "B" does not cover all of the sales transactions between the complainants during November 1947, but is typical of the handling of all such transactions.

VIII

Complainants particularly desire to call to the attention of the Court the provisions of Section 9(b) of the Atomic Energy Act of 1946, reading as follows:

"In order to render financial assistance to those states and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to state and local taxation, the Commission is authorized to make payments to state and local governments in lieu of property taxes, Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the state or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the state or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exexpited from taxation in any manner og form by any state, county, municipality or any subdivision thereof,"

The complainants allege that all of the transactions of Carbide and Carbon Chemical Corporation and all of its acts [fol. 137] entered into and performed under the contract above mentioned are activities of the Atomic Energy Commission within the intendment and purpose of Section 9(b) of the Atomic Energy Act of 1946, and that if the Tennessee Retailer's Sales Tax is construed as being applicable to the activities or transactions which are herein questioned, that Act is invalid as applied because it is repugnant to the Atomic Energy Act of 1946 including Section 9(b) thereof and if construed as applicable to the activities or transactions as above mentioned is invalid as applied because it is repugnant to the Constitution of the United States.

IX

The said tax paid to the defendant as above averal was paid under protest and duress and if it had not been paid, process, either actually issued and in the hands of an officer, or in the defendant Commissioner's hands, would have been levied against the property of the complainants or one of them, and sufficient thereof for the payment of said tax would have been seized. Said payment was the only way of averting such action. Said payment was wholly involuntary and was expressly made without prejudice to any and all rights of complainants to the recovery thereof and to establish immunity from and non-liability for such tax. defendant Commissioner expressly accepted the payment would leave available to the complainants the full right to sue for the recovery thereof without meeting the defense of voluntary payment, and that such defense would not and could not be asserted.

The Premises considered, the Complainants pray:

1. That process issue and be served upon the defendant and that he be required to answer or otherwise plead to this original bill but not under oath, his oath being expressly waived.

[fol. 138] 2. That a judgment be entered against the defendant Commissioner which will set forth that the transactions of the complainants, described in the foregoing original bill, and like transactions occurring since those described above, and occurring currently and in the future, are not subject to the tax provided for in the Tennessee

Retailer's Sales Tax of 1947, and which judgment shall also entitle the complainants to have and recover of the defendant the sum of \$2,148.08, being the amount collected by the defendant from the complainants as a Sales Tax under said Act.

- 3. That upon the completion of the hearing and decision by the Court, a permanent injunction be granted the complainants which shall restrain the defendant and his successors in office from seeking to apply the said Act to the transactions of the complainants of the nature above described, and from seeking to recover from the complainants, or either of them, any alleged sales taxes provided for in the said Act.
- 4. For such other and general relief as the complainants may be entitled to.

Diamond Coal Mining Company, Carbide and Carbon Chemical Corporation. By S. Frank Fowler, Solicitor, Cates, Fowler, Long and Fowler, 1412 Hamilton Bank Building, 1 noxville, Tennessee.

Duly sworn to by S. Frank Fowler. Jurat omitted in printing.

[fol. 139] Cost Bond (Omitted in Printing)

[fol. 140] In the Chancery Court of Davidson County
Subpoena to Answer-Issued January 19, 1948, State of
Tennessee

To the Sheriff of Davidson County, Greeting:

We command you to summon Sam K. Carson, Commissioner of Finance and Taxation of the State of Tennessee, and Individually, if to be found in your county, to appear in person or by attorney before the Chancellor of Patt Two of our Chancery Court at Nashville, on the 1st Monday in February, 1948, it being the 2nd day of February, 1948, there and then to answer the Original Bill of Complaint of Diamond Coal Mining Company, et al. vs. Sam K. Carson,

Commissioner, etc. and further do and receive what our said Court shall consider in that behalf; and this you shall in nowise omit, under the penalty prescribed by law. Herein

fail not, and have you then and there this writ.

Witness, Jas. E. Covington, Clerk and Master of our said Chancery Court, at office in the Courthouse at the City of Nashville, Tennessee, this first Monday in October, 1947, and the 172nd year of American Independence.

Jas. E. Covington, Clerk and Master, by Emily Lord,

D. C. & M.

Sheriff's Return:

Came to hand same day issued and executed by serving subpoena on Sam K. Carson, Commissioner of Finance and Taxation of State of Tennessee, and leaving a copy with same. This January 20, 1948.

Garner Robinson, Sheriff, by J. H. Alexander, Deputy

Sheriff.

[fol. 141] IN THE CHANCERY COURT OF DAVIDSON COUNTY

DIAMOND COAL MINING COMPANY et al.

Ve

Sam K. Carson, Commissioner of Finance and Taxation of Tennessee

Answer to the Original Bill-Filed February 10, 1948

Comes defendant Sam K. Carson, Commissioner of Finance and Taxation of the State of Tennessee, and for answer to the original kill filed against him in this cause does say:

1

For answer to the allegations of Section I of the original bill, defendant says:

Defendant admits that complainant Diamond Coal Mining Company is a Delaware corporation qualified to do business in Tennessee, with its principal office in Campbell Coanty, Tennessee.

Defendant ac aits that complainant Carbide and Carbon Chemical Corporation is a New York corporation qualified to do business in the State of Tennessee, with its principal office in Roane County, Tennessee.

Defendant admits that he is the Commissioner of Finance ant Taxation of Tennessee and is charged with the duty of collecting, and is collecting, the Tennessee Retailer's Sales Tax.

Defendant admits that he required complainant Diamond Coal Mining Company to pay sales tax as alleged in the concluding paragraph of Section I of the original bill, but he denies that his action is so doing was illegal or that complainant was not liable for said tax. To the contrary, he avers that his action in requiring the payment of said tax was lawful and that the complainant was liable for said tax. Defendant denies that complainants are entitled to an adjudication, in this suit, of their tax liability in regard [fol. 142] to future transactions. Sections 1790 et seq. of the Code of Tennessee expressly limit the relief available to complainants, to suits to recover such taxes, as may be paid under protest. Defendant expressly relies on said statutes as a bar to complainants' request for an adjudication of future liability.

П

For answer to the allegations of Section II of the original bill, defendant says:

Defendant does not know, so he neither admits nor denies the allegations that on November 23, 1943, the complainant Carbide and Carbon Chemical Corporation entered into contract No. W-7405-ENG-26, Exhibit "A", with the United States of America, but demands strict proof of this allegation and all other allegations in Section I with regard to said contract.

He denies that the part of the contract exhibited contains all of the portions of the contract that bear upon the questicn presented in the original bill. He denies that purchases made by complainant Carbide and Carbon Chemical Corporation are financed initially by funds of the United States of America entrusted to the complainant for that purpose. For answer to the allegations of Section III of the original bill, defendant says:

Defendant does not know, so he neither admits nor denies that the Carbide and Carbon Chemical Corporation promptly entered upon the performance of the contract Exhibit "A" and has been engaged therein ever since, but demands strict proof thereof.

IV

For answer to the allegations of Section IV of the original bill, defendant says:

[fol. 143] Defendant admits that the Atomic Energy Act of 1946 became a law in the latter part of the year 1946, and that the same provides for the transfer of all properties, etc., from the Manhattan Engineer District to the Atomic Energy Commission. He admits that on December 31, 1946, the President of the United States is ned an executive order No. 9816 bringing about the transfer intended by Congress under the terms of said Act. He admits that if there was a contract between the complainant Carbide and Carbon Chemical Corporation and the Manhattan Engineer District that the same became a contract between said complainant and the Atomic Energy Commission by reason of said executive order of the President of the United States.

V

For answer to the allegations of Section V of the original bill, defendant says:

Defendant admits that complainant Carbide and Carbon Chemical Corporation has continuously purchased and will continue to purchase property taxable under the Tennessee Retailer's Sales Tax Act. Defendant denies that the property so purchased and to be purchased by the complainant has been or will be used by the United States. He avers that such property will be used only by complainant Carbide and Carbon Chemical Corporation.

For answer to the allegations of Section VI of the original bill, defendant says:

Defendant admits that during the month of November 1947, complainant Diamond Coal Mining Company sold to complainant Carbide and Carbon Chemical Corporation several thousand tons of coal delivered at Clinton Engineer Works. He denies that the total consideration paid for said coal was \$107,402.32. He neither admits nor denies that said coal was acquired and used by complainant Carbide and [fol. 144] Carbon Chemical Corporation under its contract with the Atomic Energy Commission but demands strict proof thereof. Defendant supposes that Carbide and Carbon Chemical Corporation paid complainant Diamond Coal Mining Co. the amount of \$107,402.32, together with the sum of \$2,148.08, but he denies that the payment of this latter item of \$2,148.08 constituted the payment of the sales tax by complainant Carbide and Carbon Chemical Corporation. To the contrary, he avers that the item of \$2,148.08 was a part of the purchase price and not the payment of a tax by complainant Carbide and Carbon Chemical Corporation.

VII

For answer to the allegations of Section VII of the original bill, defendant says:

Defendant would show that on December 19, 1947, complainant Diamond Coal Mining Company paid the State of Tennessee the sum of \$2,148.08 but he denies that the same was paid by Diamond Coal Mining Company for Carbide and Carbon Chemical Corporation. To the contrary he avers that the same was paid by the complainant Diamond Coal Mining Company pursuant to its com liability therefor under the terms of the Tennessee Retailer's Sales Tax Act.

He neither admits nor denies that all of said purchases of coal were handled by complainants in conformity with the procedure set out in said Section VII but demands

strict proof thereof.

He denies that the title to said coal became vested in the United States of America at the moment the title passed from the vendor. He avers that any practice on the part of the employees of the Atomic Energy Commission contrary

to the provisions of Article VIII, paragraph 4 of the contract Exhibit "A" would be unlawful. He says that if it is the practice and custom of such employees of said Commis-[fol. 145] sion to undertake to treat the tiffe to procurements by complainant Carbide and Carbon Chemical Corporation as vested in the United States of America prior to the final inspection and acceptance or rejection, without written notice of acceptance or rejection as required by said Article VIII, paragraph 4, that such practice and custom is void and does not have the effect of vesting title in the United States Government.

VIII

Defendant denies that the transactions of Carbide and Carbon Chemical Corporation performed under the contract Exhibit "A" are "activities" of the Atomic Energy Commission within the intendment and purpose of Section 9(b) of the Atomic Energy Act of 1946. He denies that the Tennessee Retailer's Sales Tax Act would be invalid if construed as being applicable to the sale of coal by complainant Diamond Coal Mining Company. To the contrary, he avers that complainant Diamond Coal Mining Company is engaging in the privilege of selling tangible personal property in Tennessee, coal, and is liable to pay the privilege tax levied against it by the Tennessee Retailer's Sales Tax at the rate fixed by said Act. He avers that the tax is levied upon complainant Diamond Coal Mining Company for the privilege it exercises of selling tangible personal property, coal, and not upon complainant Carbide and Carbon Chemical Corporation.

Defendant avers that the payment of an amount equal to the tax by complainant Carbide and Carbon Chemical Corporation upon its purchase of coal from complainant Diamond Coal Mining Company does not amount to the payment of the tax by complainant Carbide and Carbon Chemical Corporation. To the contrary of this, he avers that the amount equal to the tax which was paid by complainant Carbide and Carbon Chemicals Corporation to complainant Diamond Coal Mining Company was nothing more nor less than a payment by Carbide and Carbon Chemical Corporation of

a part of the purchase price.

[fol. 146] Defendant would show to the court that Section 5(b) of Chapter 3 of the Public Acts of 1947, the Tennessee

Retailer's Sales Tax Act, requires dealers, as far as practicable, to add the amount of the tax imposed under the Act to the sales price, and provides that the same "shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts."

He avers that Section 5(b) of the statute was adopted by the legislature to control, unfair competition and to provide for a uniform impact of the tax act upon a retail economy of the State. He avers that this provision was adopted in recognition of the fact that the cost of all taxes paid by a seller, such as complainant Diamond Coal Mining Company, must be added to the sales price in order that the seller may survive. He avers that the mere fact that the legislature undertakes to regulate and control the manner in which the seller should take the tax into consideration in fixing the sales price of an arfiele of tangible personal property cannot and does not amount to taxation of the purchaser.

He avers, since the incident of the tax is upon complainant Diamond Coal Mining Company and not upon complainant Carbide and Carbon Chemical Corporation, and since the cost of the tax falls upon complainant Carbide and Carbon Chemical Corporation by virtue of the operation of a statute enacted in recognition of economic law rather than from the operation of the economic law unaided by statute, that the Tennessee Retailer's Sales Tax Act cannot be construed as taxing the activities of the Atomic Energy Commission, even if the buying of coal by complainant Carbide and Carbon Chemical Corporation can be construed as amounting to an "activity" exempted by Section 9(b) of the Atomic Energy Act.

Defendant denies that a construction of the Tennessee Retailer's Sales Tax which would render complainant Diamond Coal Mining Company liable for the sales tax upon coal sold to complainant Carbide and Carbon Chem-[fol. 147] ical Corporation would be invalid as contrary to Section 9(b) of the Atomic Energy Act or as repugnant to the Constitution of the United States.

For answer to the allegations of Section IX of the original bill, defendant says:

Defendant admits that said tax was paid under protest and that complainants are entitled to seek the recourse provided by Section 1790, et seq. of the Code. He denies, however, that complainants are entitled to an injunction as prayed, since to grant the same would be contrary to the express provisions of Section 1795 of the Code.

Defendant here and now denies every allegation of the original bill not hereinbefore admitted and prays to be dismissed with his just cost.

Roy H. Beeler, Attorney General; William F. Barry, Solicitor General; Harry Phillips, Asst. Atty. General; Allison B. Humphreys, Jr., Advocate General.

[fol, 148] IN THE CHANCERY COURT OF DAVIDSON COUNTY

DIAMOND COAL MINING COMPANY, et al.,

VS.

SAMAK. CARSON, Commissioner, etc.

ORDER AS TO PROOF-April 7, 1949

This cause came on to be heard on the regular call of the docket, on April 4, 1949, before Special Chancellor Alfred T. Adams, and it appearing to the Court that the complainants have filed no proof, it is therefore, ordered, adjudged and decreed that the complainants take and file their proof within sixty days from the entry of this decree. [fol. 149] IN THE CHANCERY COURT OF DAVIDSON COUNTY DIAMOND COAL MINING COMPANY, et al.,

VR

SAM K. CARSON, Commissioner, etc.

ORDER OF SUBMISSION-August 31, 1949

This cause was heard before Alfred T. Adams, Special Chancellor, September 13, 1949 and former days of the term and was taken under advisement on that date.

Alfred T. Adams, Special Chancellor.

[fol. 150] IN THE CHANCERY COURT OF DAVIDSON COUNTY
No. 65163

DIAMOND COAL MINING COMPANY and CARBIDE AND CARBON CHEMICAL CORPORATION

V.S.

SAM K. CARSON, Commissioner, etc.

ORDER AND DECREE-September 23, 1949

This cause same on to be heard this date upon the petition of the United States for leave to intervene in the above cause; and was argued by counsel.

Upon consideration whereof the Court doth order and decree that the United States be and it hereby is granted

leave to intervene in this cause.

It is further adjudged, ordered and decreed that the petition for intervention filed herein on behalf of the United States be and the same is filed in this cause as the intervening petition of the United States.

Alfred T. Adams, Special Chancellor.

[fol. 151] IN THE CHANCERY COURT OF DAVIDSON COUNTY.

No. 65014

CARBIDE & CARBON, CHEMICAL CORPORATION

SAM K. CARSON, Commissioner of Finance and Taxation

ORDER AND DECREE-May 24, 1950

This cause came on to be heard this date upon the petition of the United States for leave to intervene in the above cause, and was argued by counsel.

Upon consideration whereof the Court doth order and decree that the United States be and it hereby is granted

leave to intervene in this cause.

It is further adjudged, ordered and decreed, that the petition for intervention filed herein on behalf of the United States be and the same is filed in this cause as the intervening petition of the United States.

Alfred T. Adams, Special Chancellor.

[fold 52] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 63163

DIAMOND COAL MINING COMPANY and CARBIDE AND CARBON CHEMICAL CORPORATION

SAM K. CARSON, Commissioner, etc.

PETITION OF THE UNITED STATES FOR LORAVE TO INTERVENE AND INTERVENING PETITION-Filed May 23, 1950

The United States of America, by its attorneys, J. Howard McGrath, Attorney General of the United States, Theron L. Caudle, Assistant Attorney General of the United States, and Berryman Green as Special Assistant to the Attorney General, respectfully alleges that it has an interest in the matter in litigation, and in the success of the complainants, Diamond Coal Mining Company and Carbide and Carbon Chemical Corporation, and, therefore,

desires to become a party to the litigation by uniting with the complainants in furtherance of their claims and as grounds therefor alleges:

That the intervention for which leave is prayed herein is authorized by the Attorney General of the United States at the request of the Atomic Energy Commission.

That the Intervenor adopts and incorporates herein, by reference all of the allegations and conclusions contained in the original bill herein.

That by reason of the facts so alleged your petitioner has an interest in this case which it is entitled to protect by intervention herein.

Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene [fol. 153] in this action; that are order be entered allowing intervention; and that this Petition for Leave to Intervene be considered and adopted by this Court-as the Intervening Petition of the United States. ,

Your petitioner further prays that the judgment prayed for by the complainants in their original bill be entered and that the Court grant such other and further relief

as it may deem proper.

J. Howard McGrath, Attorney General; Theron L. Caudle, Asst. Atty. General, by Berryman Green, Attorneys for Petitioner, United States America.

[fol. 154] IN THE CHANCERY COURT OF DAVIDSON COUNTY

DIAMOND COAL MINING COMPANY ET AL

SAM K. CARSON, COMMISSIONER, ETC.

FINAL DECREE-August 29, 1950.

Be it ever remembered that this cause came on to be heard on the 29th day of August, 1950, and former days before Alfred T. Adams, Special Chancellor, sitting by election of the Bar of Davidson County, Tennessee, in the place and stead of the Honorable William J. Wade, Chancellor, who was unable to attend court on account of illness, on the ofiginal bill and the exhibits theseto, including Contract No. W-7405-ENG-26, dated November, 23, 1943, entered into between complainant, Carbide and Carbon Chemical Corporation, and the United States of America, together with all amendments to said contract through the 12th day of September, 1949, the answer of defendant; the depositions of witnesses and exhibits thereto; the intervening petition of the United States of America, and the entire record in said cause and upon consideration of all of which the Court finds, in addition to certain other findings of fact, heretofore made, as follows:

That the Tennessee Retailer's Sales Tax, provided for by Chapter 3 of the Public Acts of the General Assembly of Tennessee for the year 1947, is a non-discriminatory excise tax on the complainant, Diamond Coal Mining Co., for the privilege of engaging in the business of making retail sales of tangible personal property in Tennessee. That complainant, Diamond Coal Mining Go., exercised this privilege in making sales of tangible personal property to its co-complainant, Carbide and Carbon Chemical Corporation, and [fol. 155] was liable to pay the State of Tennessee the sales tax collected from it for which it sued in this cause. That complainant, Carbide and Carbon Chemical Cofporation, is an independent contractor with the United States of America under contract No. W-7405-ENG-26, dated November 23, 1943, together with the amendments and additions thereto through September 12, 1949. That this independent contractor relationship was not changed by Executive Order No. 9816 of the President of the United States of America, effective December 31, 1946, transferring the supervision of said contract to the Atomic Energy Commission. That the complainant, Diamond Coal Mining Co., in exercising the privilege of making sales of tangible personal property in Tennessee to Carbide and Carbon Chemical Corporation for use by it in its above referred to contract with the United States of America is not exempt from the sales tax levied by Chapter 3 of the Public Acts of the General Assembly of the State of Tennessee for the year 1947, by the doctrine of implied constitutional immunity of federal agencies nor by reason of the exemptions contained in Sec-

tion 9(b) of the Atomic Energy Act of 1946 nor for any other reasons claimed in the original bill of the complainants and the complainant, Carbide and Carbon Chemical Corporation, is not authorized to purchase tangible personal property from the complainant, Diamond Coal Mining Co., for use by it in its above referred to contract with the United States of America without the payment of the equivalent of the sales tax required to be added to the purchase price of said tangible personal property by said Chapter 3. That the allegations of the original bill are fully met and overcome by the defenses raised by the answer and established at the hearing, and said bill should be dismissed at the cost of the complainants. That the intervening petition of the intervenor, the United States of America, which has been fully considered, should, likewise, be dismissed, but without cost to the intervenor.

[fol. 156] It is accordingly ordered, adjudged and decreed for the reasons stated in the opinion of the Court filed herein and authenticated by the signature of the Special Chancellor, which is ordered made a part of the record herein, and on the findings of fact made by the Court, that complainants' original bill be and the same is hereby dismissed at the cost of complainants, for which execution may issue. The intervening petition of the intervenor United States of America, is likewise dismissed but without cost.

The copies of the public documents here listed which were delivered to the Court by complainants of which judicial notice was taken, are ordered filed and made a part of this record.

Hearing before the Committee on Military Affairs—House of Representatives—Seventy-Ninth Congress First Session on H. R. 4280, October 9 and 18, 1945.

Hearing before the Special Committee on Atomic Energy United States Senate—Seventy-Ninth Congress—Second Session on S. 1717, Part 1 and Part 3.

Hearing before the Special Committee on Atomic Energy United States Senate, Seventy-North Congress, First Session pursuant to S. Res. 179, Parts 1 and 3.

Hearing before the Joint Committee on Atomic Energy—Congress of the United States—Eighty-First Congress, First Session on Los Alamos Retrocession Bill and AEC. Contract Policy.

Senate Document No. 96—80th Congress, 1st Session, Letter from the Chairman and Members of the United States Atomic Energy Commission.

[fol. 157] Report No. 1211—79th Congress, 2nd Session, Senate, Atomic Fergy Act of 1946.

Report No. 1186, 79th Congress, 1st Session, House of Representatives—Atomic Energy Act of 1945, and Part 2 of Report No. 1186.

To the action of the Court in dismissing complainants' original bill and taxing it with the costs, and in dismissing the intervening petition of the United States of America, and to the findings of fact made, and all adverse action taken, both complainants and the intervenor except and pray an appeal to the next term of the Supreme Court of Tennessee sitting at Nashville, which appeal is granted to the intervenor the United States of America, without condition, but is granted to the complainants Carbide and Carbon Chemical Corporation and Diamond Coal Mining Company only on the condition that within thirty days it execute and file with the Clerk and Master an appeal bond in the amount of \$250,00, conditioned as provided by law. It is ordered that all exhibits on file in this cause, including the public documents listed above shall be sent up to the Supreme Court in original form in event appeal is perfected.

Enter: Alfred T. Adams, Special Chancellor.

[fol. 157a] IN THE CHANCERY COURT OF DAVIDSON COUNTY

No. 65014

CARBIDE & CARBON CHEMICALS CORPORATION

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION

and

No. 65163

DIAMOND COAL MINING COMPANY and CARBIDE & CHEMICALS
CORPORATION

VS.

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION

STIPULATION AS TO EVIDENCE-June 10, 1949

In this cause for the purpose of simplifying the introduction of proof and expediting the cause it is stipulated that the complainants may introduce in evidence, without objection, the following portions of the document published by the United States Government popularly known as "the Smyth Report," which is formally entitled, "A general account of the development of methods of using atomic energy for military purposes under the auspices of the United States Government, 1940-1945," by H. D. Smyth, publication authorized as of August 1945:

Pages 20 and 21, paragraphs 160, 2.1 and 2.2.

Page 27, paragraph 2.27.

Page 29, paragraph 2.34.

Page 30, paragraphs 2.36 and 2.37.

Page 59, pagographs 5.23 and 5.24.

Pages 61-62, paragraphs 5.32—5.34 inclusive. Pages 79-81, paragraphs 7.4—7.13, inclusive.

Pages 102 to 104, inclusive, paragraphs 8.34 to 8.48, inclusive.

Page 110, paragraph 8.70.

[fol. 157b] Page 125, paragraphs 10.1 and 10.2.

Pages 127 to 135, inclusive, paragraphs 10.9—10.42, inclusive.

Chapter XI, pages 136-149, inclusive, paragraphs 11.1—11.48, inclusive.

It is further stipulated that the complainants may introduce in evidence, without objection, pages 1 to 22 (middle of page) of report published by the United States Atomic Energy Commission and published by the United States Government Printing Office, entitled, "Atomic Energy Development 1947-1948."

This 7th day of June, 1949.

S. Frank Fowler, Solicitor for Complainants; Allison B. Humphrey, Jr., Solicitor for Defendant.

[fols. 158-161] Bond on Appeal for 250.00 omitted in printing.

[fol. 162] IN THE CHANCERY COURT AT NASHVILLE,

No. 65014

CARBIDE AND CARBON CHEMICAL CORPORATION

VS.

SAM K. CARSON, Commissioner of Finance and Taxation

and

No. 65163

DIAMOND COAL MINING COMPANY AND CARBON CHEMICAL CORPORATION

VS.

SAM K. CARSON, Commissioner of Finance and Taxation

Bill of Exceptions

The depositions of Charles Vanden Bulck, Oral Rhine-bart, Vernon L. Looney, Oren W. Bernheim, W. P. Perry, G. M. Flanagan, taken by consent of parties on behalf of the Complainants in the above named causes, and the United States, which has declared its intention to intervene in these proceedings, said depositions being taken at the Administration Building, Oak Ridge, Tennessee, on December 13,

1948, beginning at 10:15 a.m., in the presence of S. F. Fowler, Solicitor of record for the Complainants; Allison B. Humphreys, Jr., Solicitor of record for the defendant; Oral Rhinebart, General Office Manager for Carbide and Carbon Chemical Corporation; and O. S. Hiestand, member of the legal staff of the Atomic Energy Commission, except that Mr. Rhinehart was not present during Mr. Vanden Bulck's testimony.

[fol. 163] All formalities as to caption, certificates and transmission are vaived, and it is agreed that said depositions, after the witnesses have been duly sworn, may be taken in shorthand by A. C. Dore, Court Reporter, and that he may, after transcribing the same, sign the names of the witnesses hereto.

The seal and signature of the notary is waived, and it is agreed the Court Reporter may sign his name. The declaration by the United States Government of its intention to intervene, and the taking of these depositions by agreement does not waive the right of the State of Tennessee and the Commissioner of Finance & Taxation of the State of Tennessee to object to the intervention of the United States Government, or its effort to intervene.

It is further agreed by the parties, acting through their counsel of record, that a single set of these depositions shall be filed in both of the above captioned causes; that these two causes shall be consolidated so far as the introduction of evidence and trial are concerned, and that the Court may enter an appropriate order so providing

For the information of the Court, counsel for the parties jointly state that the issues presented by these causes have been the subject of conferences and negotiation, between the State of Tennesses, and Atomic Energy Commission and the Department of Justice of the United States.

It has been agreed that the amount of the sales and use taxes would be paid monthly to the State as prescribed in the Sales Tax Act, and test litigation instituted to determine whether the sale and use taxes are applicable in the transactions involved in these cases and similar transactions. The outcome of such litigation also is to determine whether the taxes paid to the State shall be refunded.

[fol. 164] It is not the intention of this statement to vary or modity the agreements, but to indicate its existence and general nature.

Mr. Humphreys: I am relying in the course of the trial on the best evidence rule and the hearsay rule, which was not included in the agreement.

The rule as to the exclusion of witnesses was called for and all witnesses retired from the room except Oral Rhinehart, who remained as the representative of Carbide and Carbon Chemical Corporation.)

[fol. 165] The first witness, Charles Vanden Bulck, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your full name, age and occupation.

A. Charles Vanden Bulck, 44, special assistant to the Manager of Cak Ridge Operations.

Q. You live in Oak Ridge?

A. I do.

Q. How long have you held the position with the Atomic

Energy Commission that you have mentioned?

A. In the capacity of special Assistant to the Manager since June of this year. I have been employed by the Atomic Energy Commission since they took over the Manhattan Project on January 1st, 1947. At that time, I was head of the Administrative Division which comprises practically the same duties I have today except that I had operating responsibilities.

[fol. 166] Q. Your duties then were broader that they are

now?

A. Only in the fact that I had specific responsibility for operations, of Operation Offices Division whereas now I serve entirely in the capacity of a staff assistant.

Q. Describe briefly the kind of work that you are en-

gaged in from day to day.

A. Currently or back in January?

Q. Let's start with the current situation.

A. Well, today I am the Chief Co-ordinator with regard to the negotiations with contractors with the Oak Ridge Operation as to entering into that for its operations. When I say "all" contractors I refer to those that are not let as a result of competitive bidding.

Q. What other duties?

A. In addition to that I serve on a number of Boards and Committees for the Manager, some of them having to do with the incorporation of the town, land used in the town. I serve currently on the Board in connection with investigation of personnel under the Loyalty Provisions of the Atomic Energy Act. I handle special investigations for the Manager as administrative assistant.

Q. Now, Mr. Vanden Bulck, I think that gives us enough of an idea about your present job. Did you discharge those same functions for the Atomic Energy Commission begin-

ning January 1, 1947?

[fol. 167] A. No, on January 1, 1947 I was the Chief of the Administrative Division which involved broad supervision over the Fiscal Branch, the Contract and Legal Branch, the Property Accountability Branch, and the Government Civilian Personnel Unit. That's about all.

Q. Before January 1, 1947 by whom were you employed

and what were your duties?

A. From September, 1946 when I got out of the Army, I. resumed the same position I had while I was in the service in a civilian capacity, which involved the same duties I have just listed as of January 1.

Q. Were you a civilian employee of the Army from Sep-

tember 1, 1946 until January 1, 1947?

A. That September 1st date I am not too sure about but it was in September when I took-it may be August of that year-somewhere in there that I took up my actual duties in a civilian capacity. I got into the Army in October, 1942. At that time I was furloughed from my civilian job with the Manhattan Project. I served for a period of about four years in the Army with the Manhattan Project.

Q. You say you got out of the Army in 1942?

A. No. 1946.

Q. You say you went into the Army in 1942?

A. That's right.

Q. Where were you employed before 1942? [fol. 168] A. I have been employed by the Corps of Engineers since December, 1923.

Q. In a civilian capacity as of that date?

A. In a civilian capacity as of that date until the time I was furloughed and got into the Army.

Q. What was the Manhattan District, Mr. Vanden Bulck?

A. The Manhattan District was a special division organized nominally under the Chief of Engineers of the Army to carry on the construction work and the research incident to the completion of the project which was the production of the atomic bomb.

Q. In the course of your employment by the Corps of Engineers were you brought into contract with this project

for the development of fissionable material?

A. Yes, in June, 1942 I was employed by the Syracuse District, at Syracuse, New York, and as a result of a special meeting called by the District Engineer, Colonel James C. Marshall, we met in his office one Sunday in June, 1942 and he advised us that a special project had been assigned to the Syracuse District the extent of which he was unable to reveal to us at the time, but it was important enough for him to hand-pick his organization and start up working as a separate unit, separate and distinct from what was under the control of the Syracuse District, and we operated in that capacity until August 15, 1942, I believe it was when the official order was issued by the War Department establol. 169] lishing the Manhattan District.

Q. Was there a separate appropriation for the Manhattan District?

A. No, the initial appropriation was disguised and came from what was then surplus funds or extra funds available to the Corps of Engineers, and we retained that Engineers' appropriation until June, 1946 with the War Department appropriation labeled "Atomic Services" as part of the War Department, it became a part of the appropriation Bill.

Q. Do I understand that the funds which enabled the Manhattan District to operate were concealed so to speak

in funds of the Army, the Army Appropriation?

A. That's correct. The Corps of Engineers had available to it funds which were labeled "Engineer Services, Army", which were the funds which we first started out with. Subsequently, they also received an appropriation labeled "Expediting Service and Supply" and it was between those two types of funds that we drew all of the funds necessary for the project.

Q. Can you tell us the purpose of so hiding the funds of the District?

A. Yes, the project we were on was such that the enemy

forces with whom we were at war were not to get any indication of how extensive the American Government was [fol. 170] pursuing the atomic energy project and our normal procedure requires the review of objectives by various Appropriation Committees in Congress, and the public records made thereof are available to anyone that wants to buy them, and the orders with regard to this project were that nothing would be done to disclose its purpose or the fact that it even existed, which was one of the reasons why we put the fence around this area.

Q. Did the General Accounting Office have anything to

do with the Manhattan District?

A. In the early stages, no. We refused to give the General Accounting Office any information, and finally we decided to bring them in because of the tremendous backlog of auditing that they would have to perform, and I believe that that was somewhere in February 1943 or '44, I am not sure which, that we actually invited the General Accounting Office to establish an office at this location and at Richland, Washington. We at that time had a backlog of in excess of ninety thousand vouchers that we had paid out which had not been released to them at all. They had been kept here.

- Q. Mr. Vanden Bulck, was GAO invited to establish offices at the two places you have mentioned because of their jurisdictional right, you might describe it, or simply as an extra protection to the AEC or rather the Manhattan District?
- A. Well, under the law that the Comptroller General's Offices established he has the right to review, for the pur[fol. 171] pose of compliance with the appropriations, all of the expenditures made by Government Agencies. It acted both as a protection to the contractor and to the Government Agency and the Manhattan District which maintained the payments as currently as possible. I would like to enlarge on that a little bit, Mr. Fowler. In order to protect the contractor from the reopening of some of these expenditures at a later date, and the possibility of him being assessed for reimbursements made to him or of having certain of these reimbursements disallowed, we deemed it in the interest of all concerned to bring the General Accounting Office in.
 - Q. Mr. Vanden Bulck, was this Oak Ridge project or

whatever you call it, the Clinton Engineer Works, established by the Manhattan District?

A. Yes.

Q. Can you tell us the requirements to which the property had to conform in general in order to meet the desires of the Manhattan District?

A. May I ask this question: Do you mean the area itself?

Q. Yes, the physical necessities of the situation?

A. What we knew of the technical processes involved at that time indicated that we must have a tremendous supply of electric power in order to operate the plants. We also bad to find an area that was isolated enough so as to permit the use of natural barriers and our own implementation to keep the general public off the area and prevent any knowl[fol. 172] edge from getting out.

Q. Did you also need water?

A. We needed water, yes.

Q. So you have named isolation and electric power and water as being the three prime necessities?

A. That's right.

Q. When was this project established here?

A. I believe the first filing on the taking of the land took place in late July or early August, 1942, because I remember particularly Mr. Cline, who was the Chief Engineer for Stone & Webster, and who was responsible for the construction of the town and the Y-12 plant area, calling me and asking that I arrange for certain takings through the Ohio River Division. That is the earliest date. The actual name for the area, Clinton Engineer Works, did not come into existence until later.

Q. What do you mean by the Ohio River Division?

A. The Corps of Engineers has its real estate acquisition procurement de-centralized to where each one of the division offices scattered throughout the country had as a part of their operation a real estate section to acquire land, which the War Department disposed of when it became surplus.

Q. And that agency was the Ohio River Division?

A. The Ohio River Division was responsible for this area.

Q. Did the United States acquire the land comprising [fol. 173] this project area?

A. They did. Some of this they immediately purchased

through negotiated sale. In other cases they had to file condemnation proceedings.

Q. Can you tell us the size of the area?

A. Somewhere around 55,000 or 56,000 acres.

Q. Can you tell the purpose of this acquisition by the United States?

A. The purpose was so that they would have sufficient land and sufficient ioslation to construct a plant and town remotely enough located from the plant area so as to be a protection to the residents in case something went wrong or to give the plant the isolation it needed to prevent the public from seeing it.

Q. What activity was to be carried on in this area?

A. There were three operations contemplated for this area. The first one that was started was the electromagnetic separation process. The second one was the experimental plant which today is known as Oak Ridge National Laboratory but was actually a forerunner for the production plants that they actually constructed, and the third the gaseous diffusion process which is known as K-25 and operated by Carbon and Carbide Chemical Corporation.

Q. All of this is related to fissionable matter?

A. That's correct. Fissionable material as we know it [fol. 174] today comes in two forms: One in the form of plutonium which is produced at Hanford and the other U-235 which is extracted in either the electro-magnetic process or the gaseous diffusion process.

Q. Was all of this activity related to National Defense?

A. Yes.

Q. What was the stage of learning and also the stage of manufacture in those early days of the Oak Ridge Project? Did people know what they were doing with assurance?

A. No, not all the people. Some of the scientific personnel knew because they were responsible for the invention

of the process.

Q. Did they even have well-laid-out and tested methods

of procedure in dealing with fissionable materials?

A. No, because the entire history of fissionable material was comparatively recent. It was probably the largest calculated risk anyone ever took. All of our contracts in connection with plant operation specifically provided that the operator did not guarantee that he could or would produce anything; that he would do the best he knew how in

operating the plant and producing the material the Government wanted but he never guaranteed that he would produce it because he was not familiar with any prior processes of separating fissionable material from its basic ingredient, uranium.

Q. Were these operations at Oak Ridge carried on under

[fol. 175] risk of injury?

A. Yes, all operations were carried on on that basis, but early in the game the people who were responsible for the health of personnel working with this material were fairly well-familiar with some of the peculiarities of the material and we took what we considered then the precautionary measures and all precautionary measures we could possibly take to protect them to the Nth degree, and actually we found out that the confidence we had placed in the Health Physicists was not misplaced because our record here is enviable from that score.

Q. Can you tell us whether or not there is any common provision in the contracts for the operators which holds them harmless, and if so who suggested that, what was the

origin of the provision?

A. It originated with the negotiation of the contract with the DuPont Company. They actually were requisitioned for the job at Hanford and for that portion of the work that they did down here. Under the terms of the powers vested in the President by the War Powers Act, anything or any service could be requisitioned, and he would make suitable terms for payment. The DuPont Company insisted upon a complete "hold harmless clause"; as they pointed out, there is no previous experience or skill in regard to operating the plants or producing the materials, and they felt that they should not take such a risk strictly on their own ability. They had to have assurance by the [fol. 176] Government that regardless of what happened the Government would pay the bill. That clause in the contract was submitted to the General Accounting Offices; for their prior review, because we had doubt as to whether we were in position to write such an article in the contract, and the General Accounting Office concurred and permitted us to use it in view of the special nature of the project. To answer your question specifically, it was included in the contract with Tennessee Eastman Corporation, with Carbide and Carbon Chemical Corporation and the DuPont Company for the construction of the laboratory plant here

and subsequently in the contract with the University of Chicago which operated the plant and in turn in the contract with Monsanto who took over the operation in July, 1945.

Q. You say that same provision?

A. The same general "hold harmless" provision was

included in all contracts.

Q. You say originally DuPont insisted that such provision be inserted. Why was DuPont in position to be able to insist?

A. I assume that DuPont wanted to give its wholehearted cooperation without a thought that it was exposing itself as well as personnel to hazards of which it had no knowledge, in addition to which the technical nature of the plant was such that they did not know how far the public might be involved in any unusual happening in the plant, whether from the possibilities of explosion or noxious gases or other hazards.

[fol. 177] Q. Did the United States find itself in position where it had to avail itself of private organizations such as

the DuPont Company!

A. Yes, because the United States Government in its operations of the Government is not experienced as a chemical operator. It operates no plants for any of its services except some arsenals. It gets all of its powders and explosives produced by private interests, and in the main it needed the type of people that only private industry could supply. In that I am talking about chemists, physicists, metallurgists and so forth. :

Q. What do you mean by the expression "DuPont was requisitioned"?

A. They were ordered by the President of the United States to take the job.

Q. Did DaPont want the job!

No, in fact they had a provision in their contract that permitted them to get out of the operation just as soon as hostilities ceased, that is, active warfare, not just a question of waiting until the Peace Treaty was signed but as soon as the shooting war stopped, DuPont wanted to get out.

Q. What compensation did the DuPont Company ask for

in connection with their operations!

A. They asked for reimbursement of all of their costs plus a fee of one dollar. In the reimbursement of all of

their costs they were paid all direct expenses plus an over-[fol. 178] head allowance to cover indirect expenses of their home offices, company plants and so forth, with the express provision in the overhead clause that if the DuPont Company, after it examined its experience, found that the overhead allowance was excessive they would return volun-

tarily the excess to the Government.

Q. Mr. Vanden Bulck, I want to call your attention to the document known as the Smyth report which is a publication printed in the United States Government Printing Office bearing the title, "A General Account of the Development of Methods of Use of Atomic Energy for Military Purposes under the Auspices of the United States Government, 1940-1945." This was written by H. D. Smyth. It is likely that General Humphreys and I will reach an agreement as to what parts of this book the Court may take judicial notice of. Let me ask you, Mr. Vanden Bulck, wherever in this report there is a reference to the Clinton Project or the Clinton Engineer Project or area or Oak Ridge Project do all such references relate to this project in which we are presently which has been commonly known as the Clinton Engineer Project?

A. Mr. Fowler, I have never read the report, know whether those references are correct. I assume they are correct. I suppose the report was proofred before submission to the printer so I think that we can assume that

that is probably frue.

Q. Have you heard of any other Clinton project in the [fol. 179] program of the Manhattan Engineer District?

A. No.

Q. Or any other Oak Ridge Project?

Q. Now coming more specifically down to the subject: matter of these causes, did you participate in the formation and execution of the contract between the Manhattan Districk and Roane-Anderson Company?

A. Yes.

Q. Can you tell us a little bit of the early contacts between the parties which later resulted in the execution of the contract and of the general circumstances?

A. The Town of Oak Ridge was built and ready for occupancy beginning somewhere around August, 1943. That may be 30 or 60 days off in the actual moving of people onto

the area and putting them in houses, but the Government at that time was running the town, and like everything else, with the number of contractors involved it was felt that the Government would want to turn over to a contractor the operation of the City of Oak Ridge which included the operation of the water pumping station, filtration plant, electric distribution system, maintenance of roads and streets and maintenance of real estate. It would have resulted in the Government hiring a tremendous number of people, which the Manhattan District could not hire because it had personnel restrictions imposed upon it because it was a part of the Corps of Engineers. Therefore, the operation had to [fol. 180] be conducted by contract. That is not to be confused with the type of operation that is prevalent in our plants where technical know-how was needed and other types which the Government could not command. The Corps of Engineers has engaged in numerous projects and operated small towns in connection with some of its water storage areas and has had some experience in town operation, but because it could not get the number of people it needed it was determined to get a contractor in on the scene and have him operate the town under a direct contract with the Government. The District Engineer, Colonel Nichols, at one time asked me for my opinion with regard to getting the Turner Construction Company to operate Oak Ridge. The reason for that was that both he and I had had considerable experience with the Turner Company on the construction of the Rome Air Depot in upstate New York, where the Turner poeple had constructed an airstein and numerous buildings, including an engine test building, and so forth. Our experience and relationship with them was such that we desired very much to have someone of that caliber come in here and operate this town, and we subsequently get together with representatives of the company and we then made and negotiated the details of the contract.

Q. The contract between the parties was initiated by Colonel Nichols acting for the United States?

A. That's correct.

[fol. 181] Mr. Green: And Manhattan District.

The Witness: Edon't believe that the Turner Construction Company ever approached Colonel Nichols with the idea in mind that they wanted to operate the town. Q. What was the attitude of Turner Construction Com-

pany when approached?

A. At first they were not very enthusiastic about it, but I believe that Colonel Nichols, because of his knowledge of the people comprising the organization, was able to convince them that they should do this, that in so doing they were helping us out and making a justifiable contribution to the war effort.

Q: Did the Turner Construction Company then cause the

incorporation of Roane-Anderson Company?

A. Yes, the Turner Construction Company, as the name implies, is a construction company which has affiliations with the unions covering the labor on construction jobs which is the AFL. Coming into an operation such as this it could hardly be construed as a construction job, and different rates of wages would be paid than would be paid for construction work and accordingly they decided, in order not to have their relationship jeopardized on other work that they were doing as constructors, to set up a separate corporation to handle this operation.

Q. Can you tell us in fairly brief fashion just what kind [fol. 182] of work Roane-Anderson Company has done here

under this contract?

A. Yes, I think I can. They maintain all of the streets in the town and the roads up to the plants. They operate the water pumping station and the filtration plant; they are responsible for the maintenance of the electric distribution system in the town and incidentally operating the water plant involves the water distribution system of the town; they operate the town sewage plant and its distribution system; they act for the Government in the letting of concessions and all needed services that a town of this type They at one time operated the dormitories subsequently placed there on a concession basis; they operated the cafeteria, placed that on a concession basis. Later on they operated the guest house and put it on a concession basis at a later date. They also maintained all of the Government buildings in the town and have from time to time under special arrangements handled construction work for the Government on a sub-contract basis. They also hire on their payroll the police force of the town, but the actual control of the police force is direct- by the Government. They likewise hire all of the Fire Department personnel which

in turn is directed by the Government. They also hired all of the personnel that operate the hospital but who are under the direct supervision of the Medical Director of the Government.

Q. All of those things were done under the contract re-

[fol. 183] ferred to in the original bill in this case?

A. Yes, I may add that they also operated the bus system on the area which includes the town transportation system and the bus system between the town and the plants and subsequently that was cancelled out and a separate contract was entered into with American Industrial Transit.

Q. What, if any, municipal services do Roane and Anderson Counties furnish within the Clinton Engineer Area?

A. The only services that I know of are due to the arrangements with the two counties involved that in the event of the apprehending of an individual who commits a crime or misdemeanor and comes under the Tennessee State Laws, he is arrested by one of the policemen of Roane-Anderson Company, but who also has been given arresting powers due to the fact that they are deputy sheriffs of both of the county sheriffs involved, and then the individual is then turned over to the county for whatever action is required in the case.

Q. Who maintains the schools and streets, for instance, within the area?

A. The streets are maintained by Roane-Anderson Company. The schools are maintained by Anderson County under a direct contract with the Commission or the Manhattan project, and we reimburse all of the costs of that operation.

Q. Now in your testimony you have referred to streets within the area and roads within the area leading up to the [fol. 184] plants. Who owns those streets and roads?

A. To the best of my knowledge the United States Government.

Q. You have mentioned water plants, and electric and water distribution systems. Who owns those?

A. All of that was owned by the Government.

Q. Is the same thing true of the sewage plant and distribution system and the dormitories and the cafeterias, the Guest House and the other to which you referred?

A. Yes, there is only one qualification I could make in that, although it still is Government ownership, and that is

some of the Tennessee Valley Authority high lines going through here that are owned by Tennessee Valley Authority, but that is also a Government organization.

Q. Did you have any participation or direct knowledge concerning the entering into of the contract with Carbide

and Carbon Chemical Corporation?

A. Yes. The work I did was started in New York and was finally concluded after we had moved our headquarters office to Oak Ridge.

Q. Who negotiated the cont-act the ??

A. I believe it was General Groves who contracted Mr. Rafferty who was Chairman of the Board of Union Carbide Company.

Q. What was the attitude of Mr. Rafferty or his com-

pany?

· A. Mr. Rafferty wanted very much to undertake the oper- . [fol. 185] ation for the Government. It was a new field in which they had had no experience, and they realized that such service as the type that they could furnish was necessary after the general inception of the process was explained to them, and he agreed that Carbide and Carbon would do everything in its power to help out.

Q Did you participate in the actual formulation of the Carbide & Carbon contract as well as the Roane-Anderson

contract?

A. Yes.

Q. I believe that the original Carbide & Carbon contract refers to plant K-25; is that correct?

A. Yes.

Q. You have also referred to the Oak Ridge National Laboratory, which is commonly referred to as X-10. Whom

was the initial contract awarded to?

A. The construction of that was with DuPont. The first operations, that contract was with the University of Chicago until June 3rd, 1945 at which time Monsanto took over the operation and they operated until February 29th of this year.

Q. At that time it was taken over by Carbide & Carbon?

.A. Yes.

Q. Did you participate in the formulation of those contracts with the operating companies and the University&

A. Yes.

[fol. 186] Q. There has also been a reference to Y-12. What is that, the electro-magnetic process?

A. The electro-magnetic separation plant operated by

Tennessee Eastman Corporation of Kingsport.

Q. Did you participate in the negotiations, in the formulation of the contract with Tennessee Eastman?

A. Yes.

Q. Was that plant later turned over to Carbide & Carbon?

A. That's correct. As the process went along the decision was to actually improve the gas diffusion process to the point that they no longer needed the electro-magnetic separation process.

Q. And thus we are correct in understanding that you participated in all of the negotiations for the contracts and with the people that I have named, Roane-Anderson Com-

pany and these three plants?

A. Yes.

Q. Can you give us the sense of urgency or pressure attending the formulation of the contracts and whether or not the doing of the work awaited the completing of a formal contract?

A. No, in each case we got the work started by issuing what was known as a letter contract, or letter of intent, which indicated the Government's intention to enter into a more definitive contract just as soon as the scope of the [fol. 187] work could be established and the various administrative requirements of the contract made definitive enough to put in a written document. The contracts in most cases were entered into long before the plants were actually completed, because they all involved the employment of large numbers of personnel that needed training. All those people were trained while the plants were actually being constructed, so that when the key was turned over to the operator they had a group of people in position to go in and operate the plant.

Q. Were the formal contracts propared in a leisurely fashion and with deliberation or was there some atmosphere of haste?

At The formal contracts, if you will go back and check some of those, sometimes were dated almost a year after the etter contract was first placed with the company, Secause of the number of negotiations we had to have with the organizations to get an agreeable document to both sides. Q. What were the sources of the various provisions under these contracts?

A. To a great degree they originated in the standard form contract that the War Department had prepared and used in its general operations in connection with the work. They had standard forms for construction of that operation for archietect and engineer work, and we used applicable phrases from those contracts.

[fol. 188] Q. This "hold harmless" provision was that included in that type of contract?

A. No.

Q. Has experience pointed out any provision- in the contract which were really irrelevant or not designed for the actual situation developed here?

A. Could you be a little more specific on that, Mr. Fowler?

Q. What I am trying to inquire about is whether under the haste and pressure of the war situation, these contracts in some particular may simply amount to a collection of provisions from antecedent contracts which might have related to different kinds of situations or operations?

A. Why, in general we had a fair idea of what the operation involved, and while as I stated before, a lot of the phraseology had its origin in War Department contracts, we were not bound by the normal regulations of the War Department and changed the wording to a considerable degree to suit our immediate needs.

Q. Well, we will come to one or two of the provisions that I have in mind. Mr. Vanden Bulck, did you participate in the formulation of other contracts which entered into the care and maintenance of this project area, such as Stone & Webster's and all of the rest of them?

A. Yes, I was one of the original parties to the Stone & Webster contract.

Q. Were there few or many of such other contracts? [fol. 189] A. There were quite a number of them although we attempted to place major contractors with known industrial operations and thus permit them to handle most of the phases under the operation by sub-contract.

Q. Is there or was there any counterpart in industry for the operations here conducted?

A. No, there was not:

Q. I am going to ask you to file the Roane-Anderson Company contract in the Roane-Anderson Company cases as

Exhibit No. 1, and to file in the Carbide & Carbon cases the Carbide & Carbon Chemical Corporation contract as Exhibit No. 1 in those cases.

Mr. Green: It is stipulated and agreed by all of the parties hereto that as to the area constituting the Oak Ridge plant or the Clinton Engineer Works lying and being in Roane and Anderson County, Tennessee, the State of Tennessee retains all of its original jurisdiction and rights thereto and therein.

Mr. Humphreys: There is no element or question of cession involved in this case?

Mr. Green: None whatever.

Mr. Humphreys: That clears that phase of it up.

Mr. Green: It is stipulated and agreed that George Horr, President of Roane-Anderson Company and Vice-President of Turner Construction Company is present, and upon [fol. 190] examination would corroborate Mr. Vanden Bulck in his statement relative to the preliminary negotiations between the Manhattan District, and Roane-Anderson Company and Turner Construction Company and the mutual execution of the contract. That is agreed to generally.

Mr. Humphreys: Do you want to state that he would testify to the operations of the company to the same effect?

Mr. Green: Yes, add that to it.

Mr. Fowler: As to all of which Mr. Horr has personal knowledge.

Q. Mr. Vanden Rulck, I therefore ask you to file as Exhibit 1 to the proof of the complainants in the two Roane-Anderson cases the contract, being contract No. W-7405-ENG-115 referred to in the original bills which was dated February 14, 1944, said Exhibit 1 also to include 15 modifications thereof each bearing a separate number.

A. I would like to add to that that while the contract was dated February, 1944, its effective date was somewhere in

November, 1943.

Q. Further describing Exhibit 1, each of the modifications sets forth the contract number above stated and then is entitled "Modification No. so and so." I hand you Exhibit 1 as thus described and ask you if that is an accurate copy of [fol. 191] the contract and modifications described?

A. That is an accurate copy and the reason I know it is is that I personally had this copy prepared by our photo-

graphic reproduction group from the original contract on file in the General Accounting Office.

Q. Will you file it as Exhibit 1 to your deposition?

A. I do so.

Mr. Humphreys: You have checked it since it was prepared?

The Witness: My writing is up on top showing it as

Exhibit "A".

Q. These same papers which compose Exhibit No. 1 were filed as Exhibit "A" to the original bill?

"A. That's correct.

Q. Do you file it as Exhibit No. 1 to your deposition?

A. I do.

Q. Now, in the two Carbide & Carbon cases will you file as Exhibit 1 to your deposition in those causes, the contract and modifications which were filed as Exhibit "A" to the original bill, being contract W-7405-ENG-26 with modifications each bearing the contract number just given, and they being described as "Supplemental Agreement number so and so", being the first 21 modifications to the contract? Will you file all of those as Exhibit No. 1?

A. I have previously filed these as Exhibit 'A' in con-[fol. 192] nection with the original bill; isn't that right?

Q. That's right. Those are the same identical papers.

A. I do so. There is one of them No. 20 which is missing,

that has never been consummated.

Q. Do you so file this contract with Carbide & Carbon and the first 21 supplemental agreements as your Exhibit No. 1 to your deposition?

A. I do so with the exception I believe of No. 20 which was .

never executed. There is one gap in there somewhere.

Q. Do you mean that they skipped a number?

A. It was done deliberately because we had hoped to write another supplement that involved some technical change that the contractor wanted in connection with his operations and we have never gotten around to working that out, so it still remains as a gap. I believe it is No. 20.

Q. I notice that there is no supplemental agreement No.

15, Mr. Vanden Bulck.

A. It may be 15. I thought it was 20. There is one number in the sequence missing which was reserved for certain changes in the scope of operation. It has never been executed.

Q. Now, going back to Roane-Anderson, have there been certain supplemental agreements or modifications executed in connection with the Roane-Anderson contract since modification No. 15, which is the last modification included in your Exhibit No. 1 in the Roane-Anderson cases?

[fol. 193] A. Yes, there have.

Q. I hand you mimeographed copies of modifications Nos. 16, 17, and 18 to Roone-Anderson contract, each of which is entitled "Supplemental Agreement", and ask you if those are accurate copies of such modifications 16 to 18 inclusive and if so, file those as Exhibit No. 2 in the Roane-Ander-

son cases?

A. Without personally checking these with the documents that I initialed, they appear to be in order. There are file copies that go around for initialing which I personally initialed, and the original signed documents conform with those. At I say, I assume that these are copies.

Q. Will you have those compared for accuracy?

A. I will be glad to make that statement.

Q. And supplement your testimony either by personal appearance if you complete the checking before we adjourn on these depositions, or by letter, which may be included in the record?

A. I will do that. 16, 17 and 18.

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Mr. Fowler: Is that all right, Mr. Humphreys?

Mr. Humphreys: Yes.

Mr. Green: Explain the difference between modification

and change order.

The Witness: A change order is issued under a change provision of the contract which might change quantities of certain agreed-upon items to be increased or decreased depending upon the need, whereas a modification to the [fol. 194] contracts specifically requires the agreement between both parties to it and is added to the contract.

Q. Now, Mr. Vanden Bulck, in the two Roane-Anderson cases is it true that your Exhibit No. 1 and your Exhibit No. 2 include a full and accurate copy of the Roane-Anderson contract and all modifications and supplemental agreements up to this date, that is assuming you have checked Exhibit No. 2 for accuracy?

A. Yes. We have a modification No. 19 in process at the moment which has not been signed by all parties as yet to

the best of my knowledge. Mr. Horr can verify that later or

I can verify that and let you know about it.

Q. In the Carbide and Carbon cases, Mr. Vanden Bulck, you have already filed as a part of your Exhibit No. 1 all supplemental agreements through No. 21. I hand you now supplemental agreements No. 22 and 23 and ask you if those are accurate copies of supplemental agreements to that contract which have been entered into since the date of the filing of the original bill?

A. I would like to have the same reservation with regard to these as with regard to Exhibit No. 2 to the Roane-An-

derson contract, Mr. Fowler.

Q. And you will make a similar indication as to whether they are accurate or not.

A. Yes.

- Q. Will you file those two supplemental agreements Nos. [fol. 195] 22 and 23 as Exhibit No. 2 to your testimony in the two Carbon & Carbide cases subject to checking which you have indicated?
 - A. Correct.
- Q. In connection with the Carbide and Carbon contract and supplemental agreements, I notice that there are quite a number of places where words have been obliterated from the exhibits. In all other respects, subject to the checking that you have mentioned you will do on Exhibit No. 2, these two exhibits set forth fully and accurately the Carbide and Carbon contracts and supplemental agreements?

A. Yes.

- Q. Now in the Reane-Anderson cases, Mr. Vanden Bulck, I will call your attention to Article IX of the contract in which it is provided in substance that title to all materials and so forth which the contractor purchases under the contract and for which the contractor shall be entitled to reimbursement, shall vest in the United States at such point or points asothe Contracting Officer may designate in writing, subject to a right of final inspection. Can you tell me the origin in government practices of that provision and what it was intended to cover?
- A. Yes, during the war when the War Department was engaged in tremendous expansion of industrial facilities for the production of war material, it often became necessary to place contract with contractors and manufacturers to process or manufacture equipment and material within the

[fol. 196] limits of their particular field. I have in mind there that you place an order with contractor "A" who does a certain amount of preliminary work on the material and is then directed by the Contracting Officer to ship to contractor "A" for further processing or additions of the specialties that he is particularly qualified to manufacture, and they may conceivably go to three or four different contractors before it finally winds up in the Government Facility where it is ultimately used, and the real purpose of that paragraph was to establish the title to the material in the Government at any point that the Contracting Officer should designate, so as to permit him to ship it on Government bills of lading, and to take advantage of land grant rates, and so forth.

Q. Have procurements by Roane-Anderson under this

contract been of the kind which you have described?

A. No, their procurements were for direct delivery on the project.

Q. Is the same thing true of Carbide & Carbon contracts?

A. In some cases yes and some cases no. Where it has to do with processing equipment that falls under the peculiar conditions that I have enumerated here before it would have been necessary to ship it from one point to another before final installation in the plant.

Q. Has such shipping been necessary under the Carbide

& Carbon contract?

[fol. 197] A. I believe they maybe have had some of those, Mr. Fowler. I am not too sure that they have but there have been certain changes in their plant facilities that

might have involved such shipments.

Q. Now, Mr., Vanden Bulck, would you please state whether under either contract, the Roane-Anderson or the Carbide & Carbon, that the contractor has ever designated in writing a point at which title passed to the United States Government?

A. Do you mean the Contracting Officer?

Q. Yes, the Contracting Officer.

A. To the best of my knowledge, no.

Q. Mr. Vanden Bulck, I want to ask you just a few questions about the actual method of handling procurements by both Roane-Anderson and Carbide & Carbon. What has been your understanding of the time at which title passes,

and the facts affecting that. By title passing I mean title

passing to the United States Government.

A. In connection with a shipment which under the terms of the purchase they deliver f. o. b. the vendor or manufacturer's plant, it has always been my understanding that title passed at that point. To substantiate that, in a great number of cases, I believe in almost all of the cases the shipments were made on a Government bill of lading which was prepared by this office and forwarded on to the vendor or it was shipped on a commercial bill of lading with a nota-[fol. 198] tion on it to be converted to Government bill of lading at destination.

Q. You say title passed. Passed to whom?

A. To the Government.

Q. Are the materials or procurements in the possession of Roane-Anderson Company and Carbide & Carbon labeled

or branded in any way?

A. All property that permits its marking without injury is marked by either a stamp or brand or an attached label or a metal tag which indicates it is the property of the United States either by stating that it is the property of the United States, and it may be U.S. A. or United States Army or Atomic Energy Commission or some such initials.

• Q. What exactly was the label used by Roane-Anderson Company in cases of procurement by Roane-Anderson Com-

pany, what lettering was on it?

A. I believe they used U.S. A .- R. A.A

Q. When was that label attached to procurements?

A. As soon as the material was delivered at the receiving warehouse.

Q. Delivered by whom?

A. By the carrier or the vendor if he had his own delivery service.

Q. What is the meaning of that label U. S. A.-R. A. !

A. The U. S. indicates the property, the title to it as being vested in the Government. The R. A. is merely for a [fol. 199] segregation of the property that is used by the various contractors on the area in the interest of carrying out their required functions under the contract. In other words, we have so many contractors on the area that there are items of property which are common to all of them that conceivably could be shuffled around so that the Government's interests are not protected to the greatest degree,

and we identify Roane-Anderson property or rather that Government property in the control of Roane-Anderson Company by this R. A., simply as a part of the overall symbol.

Q. Do you know what label was used in the case of Car-

bide and Carbon acquisitions?

A. I believe it was U.S. A.—C&CCC, but I am not sure of that. I cannot definitely state that.

Q. What was the meaning of that label?

A. It had the same meaning that was on the label placed on the property that was delivered to Roane-Anderson Company.

Q. When was the label attached to goods in the case of

Carbide & Carbon?

A. They had their own receiving warehouse at the plant and it would be attached at the time the property was actually received.

Q. Received from the carrier or vendor?

A. Carrier or the vendor.

Q. Are the practices that you have described with respect [fol. 200] to receipt and label of goods prescribed by the

Atomic Energy Commission?

A. Yes, and that was as a result of Pregulation that the War Department had in effect for all of the War Department property whether it was on a property or property on civil works of the War Department. The Property Manual prescribed that all property should have attached or placed on it or be marked in such manner that it clearly indicates it is property of the United States.

Q. Were the same practices adopted by the Atomic Energy Commission when it took over on January 1st,

19471

A. Yes, the same rules and regulations that the Manhattan District project operated under were continued in effect by the Atomic Energy Commission.

Q. If the Roane-Anderson contract, for instance, should be cancelled, what becomes of the property in possession

of Roane-Anderson here?

A. All of it is turned over to the Government.

Q. Is the same thing true of the Carbide & Carbon contract?

A. Yes.

Q. I will ask you, Mr. Vanden Bulck, since the Atomic

Energy Act went into effect and since December 31, 1946, has the Atomic Energy Commission been engaged here in this Clinton Engineer area in the discharge of its duties and responsibilities under the Atomic Energy Act! [fol. 201] A. Yes.

Q. Is that the whole purpose of the Commission's activi-

A. Yes.

Mr. Fowler: It is agreed between counsel for the parties that Mr. Vanden Bulck's deposition shall be filed in both the two Roane-Anderson cases and the two Carbide & Carbon cases.

(The further taking of these depositions was adjourned until 9:30 a.m., December 14, 1948 when the further direct examination of Mr. Vanden Bulck was continued by Mr. Fowler.)

The Witness: I have checked the documents you have referred to yesterday and they are both correct.

Q. You are referring to both exhibits 2?

A. Both exhibits 2.

Q. Mr. Vanden Bulck, did the Clinton Engineer project and the work done there contribute to the construction of the atomic bomb that was used against Japan?

A. Yes, the Clinton Engineer project or the gaseous diffusion plant and the electro-magnetic separation plant both separated material from basic u anium that was subsequently used in the bomb.

Q. Is the operation of this project still of prime import-[fol. 202] ance in connection with military affairs of the

United States?

A. Yes.

Q. The City of Oak Ridge is within the Clinton Engineer area?

A. That's correct.

Q. How large is the city now and what has been its

population since it was created?

A. The extent of the city in area is roughly six miles long and from a mile to a mile and a quarter in width, the long axis running east and west. At the peak, the population was in the neighborhood of 76,000. Since the gradual reduction in plant operation, which was effected

as a result of cutting out the less economical processing, it has reduced it to a population of about 36,000 at the moment.

Q. Can you tell us approximately how many miles of

roads lie within the whole area?

A. I believe it is around 156 or something like that." I remember reading that not so long ago, about 156 miles of road in the area.

Q. Does the City of Oak Ridge have a police organiza-

tion?

- A. It has an organization which we call policemen who are on the payroll of the Roane-Anderson Company, but . under the direct supervision of the AEC, with what police powers they get through the fact that these policemen are [fol. 203] deputy sheriffs of both Roane and Anderson Counties.
- Q. I believe your testimony has indicated that the city has all of the usual municipal services, such as sewage disposal, electricity and water supply and so forth?

A. It does.

Q. To what extent, if any, do Roane and Anderson Counties contribute touthe maintenance of this area, including Oak Ridge or any of the services such as police protection and all of the other usual municipal services that are maintained here for the benefit of the inhabitants and

the people living here?

A. As far as the utilities are concerned or the maintenance of roads and streets, there is no contribution by the county or state as to their upkeep. With regard to the Police Department, due to the arrangements we have made with the county officials involved, the sheriff's office, we apprehend persons who are violating a state law and then turn them over to the sheriff's office for jailing or necessary trial. That's the only service we get from the county.

Q. Can you tell us the annual appropriation of the Atomic Energy Commission for the maintenance of schools

within the area?

A. Yes, I believe that for the year 1949 that they established a figure somewhere in the neighborhood of \$2,400.00, for school maintenance. That includes the salaries of teachers and maintenance of the school buildings. Only [fol. 204] a part of that we pay to the County of Andersonfor the payment of teachers' salaries, and the reason we

have the contract with the County of Anderson for what we refer to as school operation, is to give recognition to the time that teachers spend on teaching programs in Oak Ridge for seniority and I believe for participation in the State Retirement Plan for Teachers.

Q. All of the money that maintains these schools, is

supplied by the Atomic Energy Commission?

A. That's correct.

Cross-examination.

By Mr. Humphreys:

Q. As a matter of fact, those schools which are paid for by appropriation by the Atomic Energy Commission are operated as schools of the county in order that the pupils of the schools may attend accredited schools; that's correct, isn't it?

A. That's correct.

Q. As a matter fact, although you put that in a collective sense to pay for the actual cost, they are operated as county schools in order that there may be proper credit given?

A. We made a contract with the county for the purpose of according the graduated student recognition that he

has attended an accredited school system.

Q. That's right. The money is paid over to the county and the money is distributed by the county for education, and contracts for teacher employment are handled through [fol. 205] the County Board of Flducation, and the supervision of the schools is through the County Board of Edution. That's right, isn't it?

A. That's right. I might point out that the contract provides for a payment of the administrative cost of the county incurred in connection with its supervision of the schools, of around \$500.00 to \$600.00 a month. The Superintendent of the Schools at Oak Ridge is in effect selected by the Commission, and the county cooperatively places him on the payroll.

Q. But he is a county official?

A. That's right.

Q. And all of the teachers are county school teachers?

A. Yes.

Q. Recognized as such?

A. Yes.

Q. All prosecutions for law violations within the area are at the expense of the State Government, that is, the actual trial process?

A. Yes, we have no courts in the area. Therefore, it

must be handled by the State Government.

Q. With regard to the roads in this area at the time it was determined that lands in this particular vicinity would be acquired for the purpose of building this plant or these plants and carrying on this project, it is true that there were certain roads in this area that were suffi-[fol. 206] cient to serve the area?

A. I believe so. There were roads through here. There were people living here and they had a means of ingress

and egress.

Q. When this territory was taken over and fenced off far secrecy purposes, those roads were taken over by the-I suppose the Engineers, United States Army Engineers, and they were added to as became necessary?

A. The existing roads and all of the lands in the area that comprised the Clinton Engineer Works were taken e

over by the Federal Government.

Q. But I mean the roads that were here were such as were sufficient to supply the needs and to accommodate the people?

A. That's right. I assume they were sufficient.

Q. And you have added to those roads as it has become necessary from time to time at your own expense?

A. Yes.

Q. As a metter of fact, because of the nature of your operations you have required, many more roads than would ordinarily be required by a community of that

many people?

. A. I am not in a position to give you an authoritative stritement on that but we have found it necessary because of having to isolate our plants to build direct reads of greater capacity than were in existence at the time when tfol. 207] we took over the area.

Q. So, in truth and fact, a large part of your road system is actually a part of your system of plant construction and plant location and plant maintenance?

A. That's right.

Q. Now, you are authorized under Section 9(b) of the Atomic Energy Act, and I read from that:

"In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes."

What payments, if any, are made to the state and local

governments in lieu of such property taxes?

A. Up to this time, none have been made with the exception of whatever construction you can place on the rental of bridges that we paid for that cross the Clinch River, the Edgemoor Bridge, and the Solway Bridge, on which we pay a tax or rental to the county.

Q: Now, with respect to the question of police protection and the payment of that initial cost, that is, in the employment of men to act as local peace officers or watchmen or guards or policemen, I believe that at one time the State of Tennessee undertook to bave the area opened [fol. 208] to the Tennessee State Highway patrolmen in order that they might assist in policing the area. Is that true?

A. To the best of my knowledge that question is one that came up very recently when we made a public announcement of the Commission's intention to open up the City of Oak Ridge and remove it from the restricted status it is in now, and I believe that there were individuals from this office who went to the State Capital at Nashville and consulted with representatives from the Attorney General's office and discussed that question.

Q. You don't recall that very shortly after this area was fenced off for security purposes that that question did come up, and that admission to the area was demanded, and that there were negotiations on that account between the State and representatives of the operators of this place, and that it was finally agreed that there would be no such insistence by the State!

A. I have no knowledge of that.

Q. Now, on yesterday you testified at some length with regard to the background and the inception of this plant,

but I am not exactly clear how it is operated presently." The overall head of it is the Atomic Energy Commission. The Atomic Energy Commission, does it operate these plants, use its own personnel or does it use the United States Army Engineers, or how is that? [fol. 209] A. No, the Atomic Energy Act provides for the appointment of five commissioners who shall be the head of the Atomic Energy Commission, one of whom is designated as a chairman. The Act also provides for the appointment of four directors, who have a specific responsibility under the language of the Act. It also provides for the appointment of a general manager who shall execute all of the orders of the Commission and carry on the general administration of the project. In turn, the general manager has re-delegated his authority to the Production Director, the Research Director, the Director of Engineering and the Director of Military Application. The Oak Ridge area, which comprises an operation at Clinton Engineer Works and also in the vicinity of Dayton, Ohio, is under the direct direction of the Director of Production. Mr. Franklin, who is the manager here, has been delegated the authority that he needs to supervise and oversee the area. The nature of the plant operation is such that the Government does not have on its staff or in its employ the technical means and qualifications to operate the plant. Each one of our production plants is operated by a contractor who has had considerable experience in the industrial operation of chemical separation plants, and that is the situation here today, whereby Carbide & Carbon operate the gaseons diffusion plant at K-25. They took over the operation of the electromagnetic separation plant from Tennessee Eastman and are now operating it, and they took over the operation of the Oak Ridge National Laboratory from the Monsanto Chemical, Company who had previously taken it over from the [fol. 210] University of Chicago.

Q. What plant is presently operated by Monsanto!

A. None.

Q. When did you say the operation of the experimental laboratory was taken over from Monsanto by Carbide Carbon ?

A. As of March 1st, this year.

Q. Actually, the contract between the Atomic Energy Commission and the prime contractors, except with regard to the operation of the experimental laboratory, those contracts are for the production of a known specific material in specific quantities, are they not?

A. That's right.

Q. And it is contemplated by those contracts that within the overall provisions of the contract, Carbon & Carbide will produce so much material of each type from each plant during the operating period, or does it have a production schedule?

A. If you are familiar with the Atomic Energy Act, it requires that the President of the United States each year direct the Commission to produce so much material to produce so many weapons. Those production schedules come down through the channel of the Atomic Energy Commission to this area here and here they are then passed on to the contractor. But the language in the contract still indicates that he would do his best to produce [fol. 211] that material. He has never guaranteed that he would.

Q. I don't believe that the Atomic Energy Commission and those whom it has appointed to attend to the octual supervision of its operation, not the contractors, they are not in position to produce any material themselves on account of lack of technical staff?

A. That's correct.

Q. So, actually, the methods employed by the contractor in producing the material, all of that is immediately and directly under the control of the contractor?

A. That is his -how-how for which we hired him, that's

right.

Q. In addition to the production of actual material, I believe you say that there is an experimental laboratory that is maintained?

A. The Oak Ridge National Laboratory, I believe that is what you are referring to.

Q. Yes.

A. That's right.

Q. Do I understand that the purpose of that laboratory is the possible discovery of methods of application of the material being produced, or the discovery of more economical methods of producing that material, or what is the purpose of the maintenance of it?

A. It is primarily a research laboratory, that is, engaged in what we term basic research. There are two types that

[fol. 212] industry recognizes, the basic which means delving into unknowns and sometimes it has reference to a specific purpose but not always certain of what you are going to get. The other is the type of research where we take a known discovered product and make application of it either in industry or other purposes.

Q. What is the primary object of the operation of this experimental laboratory? Is it the application of this

material that has been made to various purposes?

A. I believe in actual practice it is about half and half.

Q. Now, Y-12 and K-25 plants have passed the experimental state and there are no purchases of supplies for materials at either of those plants for any other purpose than the production of the material contemplated by the contract. Would that general statement be true?

A. If you consider that there is always a certain amount of process improvement going on and research essential. to that improvement being carried on in both of the plants.

Q. But the primary purpose of the operation of the plants and the purchase of supplies and materials is for the production of a set and agreed amount of material?

A. Yes.

Q. I believe you say that the methods to be used by the contractor in the production of those materials are such as the contractor within its experience and scientific knowl-[fol. 213] edge determines to be best to achieve that end-

and that it controls those operations?

A. It has control of the operations in that it operates the plant on a day-to-day basis. Periodically, or whenever one of his research scientists come up with an idea which indicates that there is a possibility of process improvement, then it is submitted to us. Invariably, that involves considerable investment by the Government and additional facilities and before they can go ahead and make such an addition to the existing plant they get our approval.

Q. But when that approval is granted, then the ordering and purchasing of supplies, that right and power is in the

contractor?

A. That all depends. Where, for instance, as at the present time, they have just completed negotiations with an architect-engineer for an addition to the plant, this will not be handled by the operating contractor. The reason for our keeping that separate is this: that as an operating

contractor, he maintains a wage structure for industrial operation. There is a different rate struction for a construction job, and it would create management problems that he should not be confronted with by mixing the two

within the same plant.

Q. But a contract of that character, your contract, contemplates the erection of a complete plant according to plans and specifications furnished, and that contractor has [fol. 214] the control of how he will build the plant except that he is required to meet a certain specified end when his work is done?

A. The operating contractor is responsible for the process design. He has technical supervision and responsibility to see that the plant is constructed and meets his technical design requirement. As far as structure itself is concerned, he has no responsibility for it. He may go so far as to actually procure the actual equipment because of his technical know-how.

Q. So that actually the Atomic Commission does not reserve any control and does not exercise any control over the manner in which this contractor will purchase his specified and slotted material, except that control which exists by reason of the amount of money that they will give. him with which

A. That was the facilities which were placed at his dis-

posal in which to purchase material.

Q. Let me ask you this: In the operation of these plants through contractors has there been any other effort made except in this case to separate the cost of excise and privilege taxes from the cost of the article which is being bought for use by the Atomic Energy Commission or its contractors

A. Do you mean at any other location in the Commission's operations?

Q. Yes, and with regard to any other type of excise taxes

other than the Tennessee Retailer's Sales Tax!

A. I believe a similar situation exists in the State of New Mexico where a sales tax is also in effect and something of [fol. 215] that nature exists in the State of Washington with regard to the Business and Occupation Tax.

Q. But other than those two types of taxes, they are the only two types of excise taxes that the Atomic Energy Commission and the Government has undertaken to avoid that you know of. Do you want to amplify that?

A. I believe that statement is still correct. I think it

exists. What the status of it is I don't know.

Q. What I am particularly driving at, Mr. Vanden Bulck, is this: Has the Atomic Energy Commission or the United States Government undertaken to cause the separation of the cost of other taxes from the sales price of any materials and supplies which it purchases in connection with the operation of its atomic plant! Has it undertaken to cause a separation of any other excise tax or privilege tax because that contributes to the sale price of those articles except with regard to this calculate.

with regard to this sales tax that you know of? .

A. That's a difficult question. I can say this, that the General Accounting Office who reviews our expenditures here, has indicated to us an intense interest in the outcome of this litigation, because it is their contention that while we are discussing what we know here as the Sales Tax of the State of Tennessee in this case, Section IX(b) of the Atomic Energy Act, or whatever the section is that refers to exemption from taxes, has a much wider application than [fol. 216] does the sales tax, and just as soon as this case is settled, let's assume that it is settled in the Commission favor, they will make an all-out effort to collect back all of the other taxes that have been paid as taxes.

Q. My question was this: that other than as regards this particular privilege tax, has the General Accounting Office ever required that you separate the cost of any other tax from the cost of any article purchased by the contractors

in the operation of these plants?

A. Where it is levied as a separate tax on that article, and it is distinguishable that way, the General Accounting Office has requested us not to pay the taxes or to pay it under protest.

Q. You mean where there is a sales tax as such?

A. Yes.

Q. And that is the only form of privilege tax that the General Accounting Office has required the separation of from the cost price of the article purchased by the contractors at these plants here at Oak Ridge?

A. Yes.

Q. My recollection with respect to the Carbide contract is that the consideration for the work to be done is stricken out as secret material information that cannot be disclosed?

[fol. 217] A. I would have to see the contract to make certain of that but I believe that the general striking out of amounts had to do with the volume involved in the contract specifically. That was the intent, not to put the amount in, but as far as the fee to the contractor is concerned, that has to be in it because it is recorded in the hearings of the Appropriations Committee of the Congress as passed.

Q. What is the fee that is paid to Carbide & Carbon?

A. I can figure it out from the contract. I just don't know offhand. It may be somewhere between \$1,500,000 and \$1,900,000 a year, somewhere in there, maybe a liftle more. It would not be any less than that, I am sure. You can get that information from the record of the Appropriations hearings.

Q. Could you get the information and supply your deposition with it?

A. Yes, I can do that.

Q. It would probably be more available to you?

A. I think I have a copy of it.

Q. In addition to being paid a fixed fee as you have indicated, is it or not true that Carbide & Carbon under the contract has the right to expect an interest in any patentable discoveries that are made under its operation?

[fol. 218] A. I would have to refer to the

[fol. 218] A. I would have to refer to the patent article, but I believe it provides that all discoveries that it makes are and must be furnished to the Commission, and the Commission has the right to take out the exclusive patents or not as it sees fit, and it may in some cases indicate that it has no interest in the invention, at which time the contractor may if it so elects, take out a patent application.

Q. Reading from "Article VIII-R-Patent. (a) It is understood and agreed that whenever any patentable discovery or invention is made by the contractor or its employees in the course of the work called for in this contract, the Contracting Officer shall have the sole power to determine whether or not and where a patent application shall be filed, and to determine the disposition of the title to and the rights, under any application or patent that may result." What is the purpose under that with regard to patents?

A. We maintain at this installation a group known as the Patent Branch who review all of the notebooks of the

scientists and technical experts that work for the contractors. The contractor also examines the operations and whenever he comes across something novel or that has patentable [fol. 219] possibilities, he submits that in the form of a notice to this group. They examine it and conduct the researches and come up with a recommendation as to whether, or not the patent should be vested in the United States. During the war period very few patents were actually taken out by the United States, for the simple reason that patent information is public information and we did not want anything in regard to the operation to get out as public information. However, a number of them have been processed since and I believe that they have some arrangements with the Patent Office to keep them secret. Very few if any patent applications have been referred back to the contractor, indicating that we have no interest, and under the terms of the Act of course we cannot turn anything back that has to do with the applic on or production of fissionable material.

Q. On yesterday, Mr. Vanden Bulck, you explained the paragraph in each of the contracts relative to when title to materials, tools, machinery, equipment and supplies should be considered as vesting in the United States Government, and at that time, I believe, your explanation of that article was that it was a provision put in this contract primarily because a similar provision had been in other United States Government contracts, because it enabled the Government, by designating title at the proper time, to take advantage of special freight rates that were available to it, with cerffol. 220] tain carriers. Was that correct?

A. That is correct. As I pointed out there were some procurements by a contractor of the Government involving processing through various manufacturing plants, not all of which were under the same contractor, and the material or the equipment had to be shipped from one point to the next, and the Government took complete responsibility for it. It had to do that in order to permit it to pay the contractor for the work it had completed in this chain.

Q. Now, that general statement in the contract in regard to when title shall vest in the Government is accompanied by certain provisos. Did your explanation of the matter undertake to extend to the provisos that are attached to that general statement?

A. The proviso that I believe you refer to requires that the Contracting Officer designate the point at which title

passes; is that correct?

Q. Yes, the first proviso is that the right of final inspection and acceptance or rejection of materials, machinery, equipment and supplies at such place or places as he may designate in writing, is referred to the Contracting Officer?

A. That's right.

Q. How do you relate your explanation to that proviso? A. In actual practice, the contractor places an order for equipment or supplies. They are delivered at Oak Ridge to these Government-owned warehouses that are assigned to the contractor for the execution of his work under the [fol. 221] contract.

Q. Let me interrupt you just a minute. Are they re-

ceived there by the employees of the contractor?

· A. They are received there by the employees of the contractor.

Q. Let me ask you this further question?

Mr. Fowler: Did you finish your answer, Mr. Vanden Bulck!

The Witness: I think I can add to this in just a moment.

Q. I am not going to get you off in your answer but atthat point I wanted to ask you is there any inspection maintained by the Atomic Energy Commission at that point?

A. If I can go through the process, I think that will

become clear.

Q. All right.

A. The material is received at the warehouse, and huge quantities of material come in Because we hire a contractor for his technical know-how and management, we do not attempt to duplicate the force, and therefore 90 per cent of the material that comes in has no check by a Government representative. Approximately 10 per cent of it is done selectively by spot check. He there examines the material with the contractor's inspector, and the two of them agree on the condition and he makes his report on that basis. Actually, we could not, without duplicating the contractor's entire force, engage in the inspection that the contract indicates.

[fol. 222] Q. So then the situation resolved itself down to this: If the contractor says he needs certain materials or supplies, he orders the materials and supplies, and they are delivered to him, and then he proceeds to use them in the manufacture of a certain designated amount of material under the contract?

A. That's right, with the exception of certain designated material which we must furnish him that he cannot obtain anywhere else. We attempt to have him buy everything he needs to operate the plant.

Q. An except with regard to possibly, as you say, ten per cent, there is no check or inspection maintained by the Government or the Atomic Commission. He does all that himself.

A. He does all of that himself and we accept his operation

on the basis of our ten per cent selective check.

Q. Now, this provision of the contract that you explained on yesterday contains another proviso: "Provided further that upon final inspection the contractor shall be given written notice of acceptance or rejection as the case may In the event of rejection, the contractor shall be responsible for the removal of the rejected property within preasonable time."

Is that provise complied with?

A. Wherever our selective check indicates that something should be returned, yes. But invariably it is a joint opinion reached by the two representatives, the contractor's, [fol. 223] man and our man, that some material when it arrived is not in proper condition for use.

Q. As a matter of fact, the proviso, if it contemplates inspection, it actually is not complied with because inspection does not take place except with regard to a very small per

cent of the material?

A. That's right. We just maintain a selective check.

Q. As a matter of fact, have you ever executed any written notice of acceptance as regards the large volume of

material that is bought?

A. Yes, we do in each instance. There is a receiving report which the inspector signs, even though he has not inspected all material, on the basis of the type of check that he conducts on a small portion of the material.

Q. He actually does sign such inspection statement al-

though he makes no inspection?

A. That's right.

Q. Now, on yesterday you made a statement with regard to your opinion as to title to the property, and while I did not object to it at the time, and reserved the right of objection on the trial, without waiving any right to more an objection, I would like to ask you in regard to that. Will you please state again what you said relative to your opinion as to when title to this property is vested in the United States Government?

A. In that connection, I have to refer to the various man-[fol. 224] nals that the Army, when it was operating this project, had as its guiding influence, which mahuals have been accepted by the Atomic Energy Commission until it. can substitute its own manuals. They are enormous technical manuals, and I believe that Mr. Fowler can get those for you, but they state generally that in any case, the property or the material that is purchased by the contractor will in effect be the property of the United States as soon as it is purchased, that the title vests in the Government upon delivery and is immediately marked and identified as Government property when it is delivered at the plants at which it is to be used; that for instance, to move on a Government oill of lading it must be Government property, which was the point I explained, that it vests at the f.o.b. point, which may be the manufacturer's plant. We could not ship private property on a Government bill of lading. It must be all Government property. We have had times in the pash that we had to obtain special freight rates, what is known as Section 22 quotation. It is possible to obtain that freight rate only with regard to Government-owned material. The reason for getting the rate in that manner is to hide from the general public the nature of the item being transported. Normally, to get a freight rate established, you have to go through quite a bit of publicity and file with various divisions to give them all an opportunity to examine the reason for the rate structure. We have time and again in the past gotten quotations, but because [fol. 225] the only way we could get the rate established was to indicate that it was Government property.

Q. So then, your conclusion with regard to the time when title passed to the Government, I believe you say is actually based on statements contained in manuals that were gotten up by the U. S. Army Engineers at the time that operated the Oak Ridge plants and which manuals are still in effect now, having been adopted by the Atomic Energy

Commission?

A. Yes.

Q. What are those manuals?

A. I don't know the numbers of them but the one having to do with property accountability, I believe, is known as TM 14-910. I believe that can be made available to you. What I mean is that those are the administrative regulations of the War Department which are passed on to us who are a part of it. It makes these statements. We have no other basis except to accept those at face value.

Q. You spoke of those regulations as regulations which were compiled by the United States Army Engineers to

govern cost-plus contracts; is that right?

A. Yes, the Audit Manual specifically had to do with that...

Q. Are these contracts between the Atomic Energy Commission and the prime contractors involved in these suits

such as could be fairly characterized as cost plus?

A. Yes, they are cost-plus-fixed-fee contracts entered into under the War Powers Act. That figure I gave you before [fol. 226] is \$1,920,000. That is where I estimated \$1,500,000.00 to \$1,800,000.00 as the fees paid for all of the operations at Oak Ridge.

Mr. Fowler: Paid Carbide & Carbon Chemical Corpora-

The Witness: Yes.

Q. Since these contractors are cost-plus-fixed-fee contractors, their relationship to the Atomic Energy Commission or to the Government is not essentially different from the relationship which any other cost-plus-fixed-fee contractor has to the United States Government; is that true or not?

A. That is not true. Actually, there is a different relationship in that we take a greater immediate interest in the expenditure of funds. In the normal covernment method of contracting, which is either a lump sum or a unit price arrangement where we were interested in the finished product at so much per unit or so much for the entire, amount, we buy a completed unit at the end of that time, and generally unless you get into a major job where you make partial payment, that title does not vest in the Government until the unit is turned over to you at completion. It is completely the contractor's responsibility.

Q. That same situation is true, isn't it, with regard to this material that is being manufactured by the prime contractors for the Atomic Energy Commission, that is, they

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turn out a completed amount of material under a contract [fol. 227] for which you pay them a fixed fee, and the manner in which they manufacture it is left to their own technical science and skill?

A. The fixed fee is merely a payment to the contractor to cover its know-how and management ability and so forth. In addition to the fixed fee they are reimbursed for their actual operating cost in running the plant. The contractor, to give you a picture of how this operation works starts with a raw material at the in-put end of the plant, which we furnish to him, rather he cannot buy it. The basic material must be furnished by the Government. He then processes that through the plant and it comes out an end-product which he turns over to us.

Mr. Fowler: Who owns it during that progress?

The Witness: That's a legal question. I don't know whether I can answer that. But I would say we never lose control of it and since we furnished it initially I don't believe the title has ever passed.

Q. What you are speaking of it that material from

one plant is delivered here and manufactured into-

A. No. Raw material from one of the other plants is delivered at the gaseous diffusion plant to go through the process and given to the Commission at the faucet at the other end of the plant. We then take it elsewhere where it again begins as raw material for processing into something else.

[fol. 228] Q. They get paid a certain amount for produc-

ing so many units of that material?

A. No, they get paid a fee for the operation of the plant whether they produce anything or not. I believe within the original contract it requires that a building or cell as we refer to it, has to be out of operating and in complete shutdown for at least six months or more before their fee payment stops.

Q. Now, with regard to the operation of Roane-Anderson Company, Roane-Anderson Company is a private profit-

corporation, isn't it?

A. It operates as such.

Q. Who incorporated it in Tennessee?

A. I believe the Turner Construction Company did.

Q. Is it still a subsidiary of Turner Construction Company?

A. Yes.

Q. Who are the directors of it?

A. That I don't know. I would have to refer to one of these annual statements, but I am not familiar with the membership of the Board of Directors.

Q. And it operates the services which are spoken of in the contract for an operating fee which is mentioned in the

contract?

A. That's right

Q. Now, in connection with this operation and those ser-[fol. 229] vices, what is the relationship between Roane-Anderson Company and your office as representative of the Atomic Energy Commission? To what extent do you undertake to control the operation of these services by Roane-Anderson Company?

A. Well, the contract provides for the type of services that they will perform in addition to which each year, before the end of the fiscal year they get together on a pro-

gram of their operations for the ensuing fiscal year.

Q. In the interim, after you have agreed on costs and other factors of that characters the operation of all of the facilities at Oak Ridge is peculiarly the business of Roane-Anderson Company and you are not concerned with it?

A. We do not enter into the operations. That is their

responsibility to operate.

Q. They buy all of the necessary supplies and materials and operate and you all pay the cost-plus-fixed-fee?

A. That's right, with the exception of a few minor items

which carry a statutory limitation as to prices.

Q. You do not exercise the same immediate interest and supervision over the execution of the Roane-Anderson contract that you do in regard to Carbide & Carbon and do in regard to Monsanto

A. Strange as it may seem, we do exercise greater supervision with regard to Roane-Anderson than we do the [fol. 230] others, for the simple reason that fown operation and that sort of maintenance operation is general knowledge to engineer personnel which comprises the Corps of Engineers from which the basic organization here is drawn. We know about that organization.

Q. You are more interested in the way they do it?

A. It had its public relation aspect in it.

Q. Would you refer to the contract, to any provision in the contract which reserves for the Commission any control over the manner in which Roane-Anderson Company shall discharge the functions that it contracts to discharge under the contract?

A. There are throughout the contract innumerable places where the prior approval of the Contracting Officer, who is an agent of the Commission, or his authorized representative, is required before the contractor does anything about it.

Q. What are those in regard to, if you recall? You are more familiar with the contract than anybody else?

A. That the procurements in excess of a certain amount of money value have to be submitted for approval, changes and so forth.

Q. But that simply contemplates that if the cost of the operation exceeds an amount which it has been agreed upon should probably be sufficient, that they will have to get

approval to expend any more than that?

A; No, that is not true. It has no references to the overall amount of the set-up. We might approve a program [fol. 231] for Roane-Anderson Company to spend a million and a half dollars through its own efforts in some maintenance project in town. Actually, the way the contract is written, in actual operation there is a provision there that if he places an order in excess—and I cannot remember the amount offhand—I believe it may be two thousand dollars—he must get the prior approval of the Contracting Officer or his authorized representative to place that purchase order despite the fact that he has gotten general approval of the overall project. There are a number of other actions that he takes that require prior approval of the Contracting Officer.

Q. Would you say in actual practice the reservations made in the contract in favor of the Atomic Energy Commission or the Contracting Officer are actually observed?

A. Yes, because we have had to maintain an organization

to undertake our responsibility in that regard:

Q. Now, on yesterday you referred to Rules and Regulations with reference to operations in one answer that you gave, and at that time those Rules and Regulations were not present, and I don't suppose they are this morning.

A. Can you remember exactly in what connection I men-

tioned it. I perhaps can produce it for you?

Q. I am not as clear on that as I should be. We were talking about the best evidence objection.

Mr. Fowler: The Administrative Audit Manual was one [fol. 232] thing.

Mr. Humphreys: There was another one.

The Witness: I think it was in connection with the marking of property.

Q. That's right.

A. That's "Technical Manual 14-910". I believe you have it there.

Redirect examination.

By Mr. Fowler:

Q. Mr. Vanden Bulck, in your testimony on cross-examination you summarized according to your best recollection the provisions of the Army's Manuals governing procurements which are being observed or have been observed at Oak Ridge. I will ask you in practice has the handling of purchased materials conformed to the summary as you stated it?

A. Yes, it was necessary that we comply with those Manuals because we were subject to inspection by a group that at the time the Army was in control of the project reported directly to the head of the project, General Groves, subject to the take-over by the Commission. Subject to the transfer of the activities to the Commission, that same group reported to the Comptroller of the Commission in exactly the same inspection capacity. The inspectors from this special branch went into each operation, checking the operating procedure, checking the receiving reports, checking the property records, made up an audit statement and certified the audit, wherein they either pointed out the [fol. 233] operations for correction or gave a clean bill in the event we were complying with that Manual.

Q. Do I understand that that was the procedure employed here until the Atomic Energy Commission took over, and it

is still employed here today?

A. The only change that has been made is that the units have been de-centralized so that it now reports to the Fiscal Director at Oak Ridge instead of at the Washington level.

Q. I hand you War Department Technical Manual TM 14-910 promulgated by the War Department over the signature of General Marshall, the then Chief of Staff, dated October 10, 1945, styled, "Changes. No. 1." I will ask you

to look at paragraph 37 under Section IV. and read that into the record.

A. (Reading): "37. With respect to the receiving and inspection of materials and other property, it is unnecessary for the Contracting Officer to require Government employees designated by him to duplicate completely the quantity check and quality inspection performed by the contractor in connection with materials and other property

received for use on a contract, provided &

(a) Written evidence of quantity receipt, quality inspection and acceptance is obtained from the contractor in accordance with the provisions of paragraph 42. When the [fol. 234] contractor's quality inspection functions are not conducted simultaneously with the quantity check the contractor's routines should provide for advising the Accountable Property Officer of the results of such inspections when completed.

(b) The Contracting Officer satisfies himself that the contractor's technical methods of quality inspection are competent, that the contractor's procedures with respect to quantity receipt and physical and accounting control of such materials and property conform to good commercial practice and that all such methods and procedures are adequate to protect the interests of the Government.

(c) The Contracting Officer, by frequent observation, assures himself that such procedures and methods are being

effectively carried out."

That is the method under which we operate on this project.

Q. Both under the Manhattan District and the Atomic Energy Commission?

A. Yes.

Q. Also, Mr. Vanden Bulck, I will ask you to read into the record paragraph 42 of Section V of this same document, the reason why I make this request being that paragraph 42 is referred to in paragraph 37.

[fol. 235] A. That's correct. (Reading):

"42. The Accountable Property Officer must obtain written acknowledgement of receipt of all Government property furnished to the contractor. The contractor's receiving report, shipping documents or other forms listing the property, as prescribed herein, may beused to obtain the contractor's acknowledgement of receipt and in all cases these documents must be signed by persons authorized by the contractor to receive and accept property on behalf of the contractor. A written-statement fisting the names of persons so authorized will be obtained from the contractor by the Accountable Property Officer, and he will review the documents to ascertain that they are appropriately receipted."

Q. Mr. Vanden Bulck, I notice on some of these reports that are used by Roane-Anderson Company and by Carbide & Carbon a reference to the Administrative Audit Manual and in connection with that I hand you a copy of paragraphs 202.1, .2, .3 of Chapter 2 of Part II of the Manual for Administrative Audit of cost-plus-a-fixed-fee construction contracts, and ask you if the provisions set forth in those paragraphs have been complied with by the Manhattan District and by the Atomic Energy Commission in procurements at Oak Ridge, particularly directing your attention to paragraph 202.3?

A. Yes, those are the regulations under which we operate [fol. 236] and confirm what I stated before, that on the basis of an examination of the contractor's procedure, and a selective test check by a Government representative, we accept the actual receipts by the contractors of those items which

are not physically checked by our representative.

Q. Is that paper which I have handed you an accurate copy of those paragraphs of the Administrative Audit Manual?

A. The only way that I could make that statement would be to actually compare it. I assume that whoever copied it copied it correctly. It appears to be. I would not say definitely that it is.

Q. Subject to your checking this for accuracy and reporting back to us your conclusion as to its accuracy, will you file a copy of that as Exhibit No. 3 in the Roane-Anderson cases and Exhibit No. 2 a in the Carbide cases?

.A. Yes.

Q. Now, Mr. Vanden Bulck, I broke into General Hungphreys' examination of you to ask you who owns the materials which are processed in the plants at Oak Ridge. Do you recall the provisions of the Atomic Energy Act with respect to fissionable materials and the raw materials

which may be manufactured into such?

A. If memory serves me right, I believe that Act states that title to all fissionable material is vested in the United States Government or the Commission and that small quantities may be allowed in the hands of private individuals [fol. 237] under confidential regulations to be issued by the Commission?

Q. For instance, hospitals?

General Humphreys: Experimental purposes

The Witness: I believe that you are talking about the publicity that has come out with regard to the use of radioactive material. The sort of material that generally is in the hands of hospitals for treatment of patients today is not fissionable material as such. This confirms what I stated before. I will read you from the Act here.

(Reading): "It shall be unlawful for any person, after sixty days from the effective date of this Act to

- (A) possess or transfer any fissionable material, except as authorized by the Commission or
- (B) export from or import into the United States any fissionable material or
- (C) directly or indirectly engage in the production of any fissionable material outside of the United States."

I believe the Federal Register has published regulations on the manner in which source material may be placed in the hands of individuals other than the Commission, but it is in such quantities that it creates no hazard.

Q. Who owns the material as it goes into the in-put part

of the plants here?

[fol. 238] A. We have that shipped down from one of our other operations offices. It is shipped on Government bill of lading or Government truck or other Government carrier and delivered to the contractor. It is owned by us at the time it arrives here.

Q. Who owns it after it comes out of the output end?

A. We take absolute control of it and can arrange for its shipment and delivery and so forth.

Q. With respect to the extent and control exercised by the Contracting Officer under these contracts, you have stated

that in innumerable instances the contracts recite that supervision affirmation or action by the Contracting Officer is required. You are perfectly willing to let the contracts speak for themselves on that score, I take it?

A. Yes, I could not remember all of the cases where the

contract provides for such action.

Q. You illustrated your discussion of that subject by referring to a provision requiring the Contracting Officer's concurrence in procurement of more than two thousand chollars or twenty-five hundred dollars or some sum. In practice here at Oak Ridge has his concurrence been required in purchases in smaller sums than that?

A. No, in order to maintain our supervisory force to a minimum we have rigidly observed whatever limitations the contract contained and without any attempt to control the [fol. 239] contractor below those amounts. It would require additional personnel on our staff to take on a greater

volume.

Q. Has that been an unvarying practice not to approve any purchases below the amount specified in the contract?

A. Generally, yes. Occasionally, the contractor will come across a procurement which he has some doubt about as to whether he is going to receive reimbursement for it, at which time he requests our administrative review and concurrence that it is not required.

Q. General Humphreys asked you whether or not Roane-Anderson Company is strictly a privately-owned corporation operating for profit. Can you tell us the sole purpose

of the creation of Roane-Anderson Company?

- A. Yes, I believe I went into that yesterday when I pointed out that the parent corporation, Turner Construction Company, as the name implies, is strictly a construction company and as such has to live with labor unions in the construction field, and pay a higher rate of wages than normally paid on an operation of this sort. In order that they would not disturb their relationship with construction unions we decided that it would be more advisable for them to organize a separate corporation just for this operation.
- Q. And Roane-Anderson Company was incorporated as a result of that?

A. I believe that's true.

[fol. 240] Q. So far as you know, does Roane-Anderson

do anything else besides perform its contract here exhibited?

A. To the best of my knowledge, it does not do any other business except the operations in this area.

Q. From time to time in your testimony there has been a

reference to Government bills of lading.

General Humphreys, would you require that we exhibit that?

General Humphreys: No, I think everybody knows what he is talking about.

Q. Have Government bills of lading been employed in connection with procurements by both Carbide & Carbon Chemical Corporation and Roane-Anderson Company?

A. In some instances, yes: I can cla-ify that by saying that it depends entirely on the terms of the purchase. They will send out requests for bids, and if the accepted bid provides for delivery F.O.B. the vendor or manufacturer's plant, it is either shipped on a Government bill of lading at that time, or it is shipped on a commercial bill of lading with a notation on it "conversion to Government bill of lading at destination."

Q. Can you tell us why in some instances that conversion notation is put on the bill of lading and in other instances

it is not?

A. Well, if it is not on there it means that the vendor or [fol. 241] manufacturer from whom the purchase was made has included the freight in his price, and it is not a separate item. In other words, we buy f.o.b. Oak Ridge and we do not consider freight except as a part of the purchase price. It is not considered separately.

Q. So, if any purchase is f.o.b. vendor's plant, the notation of conversion to Government bill of lading is uniformly

put on the commercial bill of lading?

A. Yes, the contractor requests that the vendor or manu-

facturer put that statement on there.

Q. Now, various questions have been asked you about the inspection practices and you have described the selective or spot check inspection which has been made by the representatives of the Atomic Energy Commission and you have referred to the preparation of a receiving report signed by that representative. I now ask you, are those inspections and the receiving report concurrent with the receipt of the goods from the vendor?

A. When the material comes in and the package is broken open they provide a tally sheet. That tally sheet is the fore-runner of the actual inspection and receiving of the report which is the typed document. The man out there physically inspecting the property does not necessarily have available to him a typewriter that he can prepare such a report on, but he makes this tally-in sheet which has the same thing on it from the standpoint of signature that the final inspection and receiving report did.

[fol.242] Q. In other words, the basic material that is incorporated in the receiving report is complete but written down on a tally-in sheet at the time of the receipt of the

goods?

A. That's right. That is the rough copy used by the inspector and checker.

Q. Is the inspection to which you refer made out when the package is broken open?

A. Yes.

Q. With reference to the questions asked you as to whether the resistance of the Atomic Energy Commission to state taxes is only applicable to the Tennessee Sales Tax, that is, so far as the Tennessee taxes are concerned, is that true, is the Tennessee Sales Tax the only tax of that state that the Atomic Energy Commission has resisted or will resist!

A. To the best of my knowledge, no. We will probably ask for consideration on some of the other taxes that are being paid that are intimately tied up with the activities of the Commission: What that will be I do not know, but forinstance, at the moment we pay the carbonic tax. We could eliminate paying that tax by procuring the material directly as a Government agency, but we find that economically that is unsound because we would then have to provide facilities for handling it, and on that basis we have paid the tax during the time the project was under the supervision of the [fol. 243] Army. However, the General Accounting Office has asked that question, that after the decision on the Sales Tax, what is our proposal with regard to the Carbonic Gas Tax, and I believe that if we can get a determination as to the meaning of the language in the Act that perhaps there may be other taxes that will be the subject of requests for refund.

Q. With respect to another phase of your cross-examination, General Humphreys pointed out that Section IX of the Atomic Energy Act authorizes the Commission to make payments to state and local governments in lieu of property taxes. Now, I don't want to start an argument as to the end result, whether detrimental or beneficial to the tax revenues of the state resulting from the establishment of this project, but tell me this: Has the crea non of this area and of this city resulted in substantial tax payments to the State of Tennessee by the private persons brought here, in the way of gasoline tax, privilege tax and sales tax under this same Act?

A. Yes, none of the actions of the Commission have been with a view toward obtaining exemption of the individual in this area who is here by reason of working on the project. In other words, every one of the stores and concessions operated in town collect a sales tax, and I presume they return it to the state, and every one of the citizens living here pay that sales tax. We all purchase gasoline at local filling stations. The s ven cents per gallon in that price is paid by [fol. 244] the people. No attempt is made to get an exemption. That is true of all of the taxes that are levied upon individuals in this area.

Q. They are not exempted simply by reason of any con-

nection they may have with this particular project?

A. That's right. Carbide & Carbon operate cafeteria in the plant. As such we have been since the inception of the state sales tax collecting sales tax on the sales of various items, some over the counter and some on meals sold to employees and that tax is returned to the State each month, and there has been no question in regard to that.

Q. Mr. Vanden Bulck, you may or may not be familiar with the provision of the Tennessee Sales Tax Act that provides for part of the revenue being returned by the State to the various local governments, such as cities and coun-

ties. Have you heard of that?

A. I have read of that.

Q. Do you know whether or not the community or the City of Oak Ridge has received any such return of revenue from the state?

A. To the best of my knowledge, they have not received such a return.

Q. Do you know why that has been true?

A. I believe the purpose of the Sales Tax Act was to provide funds to increase the educational facilities in the state. We pay directly for the cost of our educational program [fol. 245] in Oak Ridge, so, obviously, we are not returned anything for that purpose. Under the terms of the Sales Tax Act, certain surplus collections are distributed to the counties which are tied in, I believe, with the 1940 census which is the latest census of record, which keeps the distribution on the part of incorporated communities in the county within a certain population range. We are not incorporated in this area. We have no status here and our incorporated status cannot be considered in such distribution of such excess that might be returned to Anderson County.

Q. On the other hand, would you say that Roane County and Anderson County have benefited through the increase in

population at Oak Ridge?

A. I expect so. They have benefited, possibly not to the extent that we could benefit if we were an incorporated community, since whatever contribution Oak Ridge makes to the total sales tax picture is spread over the entire state, whereas, Oak Ridge would get a part of it if we had a recognized status.

Q. These operations at Oak Ridge have resulted in the unloosening of tremendous payrolls in this community and in this state?

A. Yes.

Q. Speaking of the roads within the area before this project was established, what kind of country was this through here? Was it heavily populated? [fol. 246] A. No, to the best of my recollection, it was just rolling farm land. The valleys were good for farm purposes, but those were just grazing land. They had a number of regular country dirt roads with just one paved highway which we now class as the Turnpike coming through at Elza Gate and going out toward Oliver Springs and the Robertsville section on toward Wheat and in that direction.

Q. Were any of those old roads adequate to handle the traffic demanded by the increase in population in the establishment of plants here?

A. No, they were entirely inadequate.

Q. To what extent did the Manhattan District and the

Atomic Energy Commission build or rebuild roads within the area?

A. Well, we built Highway No. 61 from what was just a two-car road to where it is a four-lane divided highway. We built the river road which runs down to the Edgemoor Bridge from what was just about one and one-half car width to two-and in some cases, a three-lane highway. We have built all of these other roads that go through this area from mainly dirt roads or black top roads into substantial highways that could bear the heavy traffic that moves over them.

Q. Did you have to build all of the streets in Qak Ridge?

Q. What did you do with that one paved road that led through this area?

[fol. 247] A. That is today, I believe, buried under our

Turnpike here.

Q. Was your Turnpike much wider?

A. Yes, the other road was just a two-car road and this is four-car width with a dividing strip.

Q. In general, has it been necessary to rebuild all of the

roads and to build supplementary roads? . .

A. To the best of my knowledge, we built all of the roads that we needed in connection with our operation. There may be some little roads going back over the hills which were connections between farms located in this area, which by reason of their location we had no use for and did not need and therefore, they are abandoned today, I would say. I would like to make one general statement. I have made a lot of statements with regard to what goes on and how these things operate. I have been in position to do that because until June or August of this year I was directly responsible for these operations. Organizationally, I was in position where the various units that conduct these things reported Since that time I have not had any operating responsibility as such, and therefore, other people had to supervise or superintend those operations. Changes have been made in some of the details that I am not aware of since I no longer watch as I did the operation.

[fol. 248] Recross-examination.

By Mr. Humphreys:

- Q. Do I understand that this statement is true since June?
- A. Since about June or August of this year when we had a reorganization and I moved into the Special Staff position as Assistant to the Manager. Prior to that time, everything I said was to my knowledge.
- Q. I believe you did explain that Oak Ridge is not an incorporated town?
 - A. That's right.
- Q. It does not have a charter as a municipality from the State?
- A. I believe it does not have the official status as an incorporated town.
- Q. On the contrary, for security reasons it has grown up in an area that has been under fence and under intensive guard, and in order to even get in and out of it you have to go through certain security investigations as regards who you are and what your business is in the area; isn't that true!
- A. To get in and out of the City of Oak Ridge requires only that somebody knows you and requests a pass. There is no investigation of the individual. The only check that is made is the check against a list of people who are barred from the area by reason of past association with the project or, for instance, we would not invite an international spy [fol. 249] in here.
- Q. The truth of the matter is, it never has been actually a town or city except as you might apply that term to a large collection of buildings and people, living in close proximity to each other?
- A. That's right. It came into existence primarily because we had to have an area such as this for the construction of the plants. It had certain natural advantages which caused this area to be selected because Knoxville or Clinton or Lake City or LaFollette were unable to absorb the numbers of people that they needed to operate the plants, and because there was not any other community here, this community was built.

(Later in the taking of these depositions, Mr. Vanden Bulck made the following statement):

I have examined Exhibit 3 in the Roane-Anderson a cases, being Exhibit 2 a in the Carbide cases, and find it to be a correct and full copy of paragraphs 202.1 to 202.3 inclusive of Revision No. 16 of the Manual for Administrative Audits.

Further deponent saith not.

. Charles Vanden Bulck, By ——, Court Reporter.

· Sworn to before me this 13 December, 1948, -Notary Public.

[fol. 250] The next witness,

ORAL RHINEHART, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. Please state your full name, address and occupation. A. Ocal Rhinehart, age 39, 305 West Outer Drive, Oak

Ridge, Tennessee, occupation General Office Manager or sometimes known as Comptroller for Carbide & Carbon Chemical Corporation in the Oak Ridge Area.

Q. How long have you held that position?

A. I have been with Carbide & Carbon in this area since Carbide & Carbon started and that was along in January, 1944, on this job.

Q. Have you held the same position all of the time?

A. I was Assistant Office Manager when I first came here.

Q. When did you become Office Manager?

A. About three years ago.

Q. Will you tell us the duties of your present position?

A. My duties are the supervision of all fiscal matters such as accounting and payroll work, the supervision of and receiving of materials and the storage of such materials, anything that had to do with fiscal affairs.

Q. The contract of Carbide & Carbon Chemical Corporation together with all of the supplements have all been filed [fol. 251] as exhibits 1 and 2 respectively in this case. When

was the first date that Carbide & Carbon started operations at Oak Ridge under its agreement with the United States Government?

A. We first started operations at Oak Ridge in January, 1944, and I was on the job when we first started operations.

Q. Did you take over production and operation of a plant

here at that time?

A. We started what is known as the K-25 plant, that is, started the groundwork for it. The plant did not start at that time but that was the groundwork for the operation of the plant.

Q. Were the plant buildings completed?

A. No, it was still under construction.

Q. When completed, you actually took over operation of the plant?

A. That's correct.

Q. And you have operated it until the present time?

A. Yes.

Q. So far as you know, you will continue to operate it for an indefinite length of time?

A. So far as I know.

Q. Does Carbide & Carbon operate any other plants at Oak Ridge?

A. They operate what is commonly known as the Y-12 and the Oak Ridge National Laboratory.

Q. Is the Oak Ridge National Laboratory known as X-10?

[fol. 252] A. That's right.

Q. So far as you are permitted by security regulations, would you tell us the functions and work of Carbide &

Carbon in these three plants at Oak Ridge?

A. I think I can briefly without disclosing any security regulations. In other words, the K-25 plant is the separation of the uranium isotopes, which is the gaseous diffusion plant. The Y-12 plant is principally now a research work plant in what is known as the electro-magnetic process separation of uranium isotopes. At the Oak Ridge National Laboratory which is sometimes called X-10 is principally research work, basic research work in regard to atomic energy and also the production of radio isotopes. That briefly, is the work carried on at the three installations.

Q. Is all of that work related to National Defense?

A. Yes, it is.

Q. In carrying out its contract with the Government, has

Carbide & Carbon had to engage in an extensive program of procurements?

A. Yes.

Q. And that has been carried on since you first started operating here?

A. That's correct.

Q. In carrying out that program, has Carbide & Carbon established a standard procedure of printed forms for use in each transaction?

[fol. 253] A. That's right, standard purchase order form. Q. Mr. Rhinehart, I hand you Exhibit 1 already filed to the testimony of the complainants in these cases, and I ask you to start with the original contract No. W-7405-Eng-26 and explain why the deletions have been made from this copy filed in this case and state the general subject matter to which the deletions pertain, the object of this inquiry being to satisfy opposing counsel and the court that the deletions required by Security Regulations are not pertinent to the questions arising in this case relating to the Sales Tax, so if you will take the first page now of the original contract itself and explain the deletions page by page through the contract and the supplements, I would be glad for you to of so.

A. The contract was de-classified principally in regard to amounts of money showing the total cost of the work and

'the corporation's fee.

On the first page, we have deletions showing the cost of the plant by Titles, and that was the total cost had been struck out from the contract and also the amount showing the fixed fee has been removed. .

Q. What are the blots at the bottom and top of the contract?

A. I could not say, Mr. Powler, without seeing the original contract:

Q. The parts deleted at the top and bottom were not parts of the original contract? [fol. 254] No.

Q. Mr. Rhinehart, with respect to the blots at the top and bottom of each page or elsewhere through the contract outside of the body of the writing, do you believe that those blots eliminated merely the markings of secret or classified information?

A. I beleive that's correct because I know that there is-

nothing pertinent to the contract that is not in the body of the writing.

Q. Now turn to page No. 1 and let's proceed.

A. There is one strike-out in the body. It also pertains to the total cost to the Government. On page 2 there is also a strike-out which is relative to the cost of the work under Title I: "Study of Available Knowledge and Information." The same thing under Title II.

Q. The same thing on page 3, under "Article III-B Title

III''?

A. That's correct.

Q. The same thing in Title IVA

A. Title IV, page 4, the same thing. This next one is such a large one I would not like to make a statement until I see the original contract.

Q. All right, we will wait until later to tell about that

deletion on page 5.

[fol. 255] A. On page 6 is also a strike-out in regard to the cost of the work under Article V. Also a strike-out in regard to the fixed fee.

Q. Now, you have before you a full copy of the contract with which you are comparing these deletions?

Q. Going back to page 5, Mr. Rhinehart, can you explain

the general subject matter of the deletion there?.

A. The general subject matter of that deletion is in regard to the product which is to be produced at the K-25 plant.

Q. And you have already indicated the nature of that, so far as you care to do so?

A. That's correct.

Q. Page 6-a.

A. 6-a is a strike-out in regard to the fixed fee schedule.

Q. That's all that those relate to?

A. That's all.

Q. Page numbered in the lower right-hand corner 5, and below that 77.

A. That's right. There is a strike-out pertaining to how the first fixed fee shall be paid. The next I find here I believe is on page 106.

Q. In the lower right-hand corner?

A. No, it is in Supplemental Agreement No. A. There is

a strike-out in regard to the total estimated cost. Page 111 is also a strike-out.

[fol. 256] Q. Page 108.

A. Oh, I missed one?

Q. At the top.

A. Oh, yes. I believe that was the word "secret".

Q. What is the word that the blot obscures on the exhibit?

A. The words are, "directions received by the bank." Page 111 there is a strike-out in regard to the cost of the work.

Q. All right.

A Page 115. This strike-out is in regard to the amount that was stated in the letter of intent, stating the sum we should not exceed.

Q. Now, I believe that completes the original contract and letter contract. Go to Supplemental Agreement No. 21 and work through in reverse order.

A. On page 1 of Supplemental Agreement No. 21 there is a strike-out pertaining to the cost of the work through fiscal year 1947, and also strikes out a figure that was previously stated in the contract in regard to the total cost of the work through fiscal year 1946.

Q. Your last figure refers to sub-paragraph D?

A. That's correct. The next one is on Supplemental Agreement No. 20 where there is a large strike-out. I would like to refer to the original contract.

Q. Mr. Rhinehart, this Exhibit has been identified as an accurate cna full copy of the Contract and Supplemental Agreements. Now, Supplemental Agreement No. 20 does [fol. 257] not appear to bear the signatures of the parties.

What is your recollection as to whether Supplemental Agreement No. 20 ever went into effect?

A. Mr. Fowler, to give you an answer on that the only way to do that would be to check my copy of the contract at K-25, which I could do by telephone if that would be admissible.

Mr. Fowler: Will you agree to that?

Mr. Humphroys: Yes, or at any time you want to. Mr. Fowler: All right, we will save that question. There may be another one. Q. That relates also to the second page.

A. Yes, the whole Agreement looks like — has not been executed. Supplemental Agreement No. 19 has removed the estimated amount and the fixed fee in connection with the operation of the Y-12 plant. On page 2 of that same Supplement, I would like to refer to the original.

Q. Page 2 of Supplement 19? . .

A. Yes. That paragraph has been removed as to the scope of the work that we shall do at the Y-12 plant. The only statement I can make is it gives the scope of the work to be performed at the Y-12 plant.

By Mr. Humphreys:

Q. In undertaking to define the scope of the work, does the deleted paragraph refer to the authority of Carbide & Carbon in the discharge of the work or does the paragraph [fol. 258] merely define the nature of the work that is to be done?

A: It defines the nature of the work that shall be done.

By Mr. Fowler:

Q. All right.

A. On page 15 of Supplemental Agreement No. 19 there is also a strike-out in regard to the estimated cost of the work and also a strike-out of the fixed fee.

Q. Mr. Rhinebart, that is page 3 actually of Supplement

A. That's fright, page 3, Supplement 19, that's correct. On Supplemental Agreement 11, page 1 there is a strike-out in regard to the total cost of the work. On page 2 of the same Supplement, there is a strike-out in regard to the cost of closing out the contract. In Supplement No. 9, page 1 there is a statement stricken out in regard to the cost of operation of part of the K-25 plant, commonly called the K-27. On page 2 of the same Supplement, there is a strike-out in regard to the total cost of the work, and I would like to also refere to the signed copy. There is a blot strick-out on the Supplement in regard to the schedule of fixed fee for operation of the plant.

Mr. Humphreys: What do you say of the paragraph on page 31

The Witness: That's a continuation of the fixed fee sched-

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ule. There are two other deletions on page 3 in paragraph 2 and on that page there is a statement struck from the [fol. 259] record in regard to the estimated cost of the work under Article V-D of the Supplement, and also the amount of the fixed fee is stricken from the record. Under Article V-E on page 4 of the estimated cost of the work has been removed and the amount of fixed fee has been removed. On the same page the estimated cost of the work under Article V-F and the fixed fee therefor has been stricken from the Supplement. Supplement No. 6—this is the Letter Supplement No. 6 page 2 there is a strike-out in regard to the total payments in which a limitation is set on total payments. Supplement No. 4, page 2—may I refer to the original contract on that?

(Looks at roiginal contract.)

That strikes out the figures changing the costs under Article II-B of Title II. Supplement No. 2, I would like to refer to the contract. That paragraph deletes the scope of the work to be performed under Supplemental Agreement No. 2; that is the nature of the work. Also the same reasons for the strike-out on the top of page 2 of Supplement No. 2. Paragraph 2 changes the amount of money involved. I believe that completes the contract and the supplements.

Q. Mr. Rhinehart, I now hand you Exhibit No. 2 filed in this case consisting of Supplemental Agreements Nos. 22 [fol. 260] and 23 which were executed since the filing of the original bills in these cases. I will ask you to go through the same process on those?

A. Supplemental Agreement No. 22 page 3, the fourth paragraph, there is a strike-out in regard to the total cost of the work under Article V-I. On page 4 of the same Supplement there is a strike-out in regard to the fixed fee. On page 5 there is a strike-out of the total amount of money to be obligated by the Government with respect to this contract. Page 11 of Supplement 22, there is a strike-out in regard to the total payments that will be made to the employees under a Medical Expense Plan. There is a strike-out on page 12 of the amount of money in regard to the same plan. Supplement No. 23 there is a strike-out of the total amount of money to be obligated by the Government through fiscal year 1949. That's all the same plan is a strike-out of the total amount of money to be obligated by the Government through fiscal year 1949. That's all the same plan is a strike-out of the total amount of money to be obligated by the Government through fiscal year 1949.

Q. Now, Mr. Rhinehart, would you call your office and find out whether or not Supplement No. 20 was ever actually executed and went into effect?

A. Yes. (Calls on telephone.) We have no record of

Supplement No. 20 ever being executed.

Mr. Fowler: General Humphreys, we want to be sure that there won't be any objection to the contract as it is put in this form, which seems to be the fullest form permitted by Security Regulations of the United States Government. [fol. 261] Mr. Humphreys: I think with the statement that has been made, and assuming of course that they are true statements, which I am assuming, and observing that the statements were made by comparison between the Exhibit and the original contract, I am convinced that the matters which have been deleted are not in relation to the matters in controversy in this litigation, and on that account do not intend to interpose any objection to the introduction of the contracts on account of the deletions.

Q. Now, Mr. Rhinehart, I am going to ask you a few questions about the financing of the operations of Carbide & Carbon Chemical Corporation under this contract. Where does the money come from?

A. It comes directly from the Government.

Q. Has Carbide & Carbon employed any of its own money in these operations?

A. At no time bave they employed any of their money.

Q. I infer, therefore, that even before operations started by Carbide & Carbon the Government advanced initial funds to mance the operation?

A. That's right, before we even started operations in Oak Ridge they had advanced us initial funds when we

operated out of the New York office.

Q. Is there at the present time a modification of the contract in process relating to the matter of advancements [fol. 262] by the Government?

As There is a change. In theory it is the same. They are still making advancements but only reimbursing us once a month against the advance.

Q. What has been the situation heretofore?

A. Previous to October, we submitted vouchers daily or several a day. Now we submit one at the end of each month reimbursing the original advanced amount.

Q. Has Carbide & Carbon any property in its possession

on this project that it did not regard as Government-owned?

A. Yes, they have four company-owned cars purchased and paid for with Corporation funds. I might also state here that we do occasionally buy a few pieces of recreation equipment from Corporation funds, and the reason for that is that the Corporation does not wish to be placed in a position of being accused by anyone at any time of advertising at Government expense, and it could be considered possibly, a basketball uniform, for example, having on it "Carbide & Carbon" and considered advertising matter. For that reason the Corporation pays for those items itself.

Q. With respect to such items as you have mentioned, that is a matter that could be regarded as possible advertising matter and the four automobiles, we are not taking the position that Carbide & Carbon is exempted from the State

Sales Tax?

[fol. 263] A. No, that's correct. There is no question

on those particular items.

Q. Broadly, as to purchases by Carbide & Carbon in the actual discharge of its contract, what has been the attitude of Carbide & Carbon as to who owns those purchases when they are acquired?

A. It has been our opinion that the rights were always

vested in the Government.

Q. Have you so treated this property?

A. Yes, always have.

.Q. Is Government ownership indicated by a stamp or

label placed on each article?

A. The property that is large enough to account for separately and individually is marked with an identifying stamp at the time of receipt, stamped directly into the equipment itself or by a label attached to the equipment.

Q. What lettering or numbering does that label bear?

A. That label at the K-25 plant bears the initials "U.S.A." meaning "United States of America" and "C&CCC", followed by a number. The same system is followed at the Y-12 plant and all numbers are preceded by a "Y". At the Laboratory, they are preceded by the initials "ORNL". Of course, all those are placed there for identification purposes. In fact, I might say that in most cases that number is applied direct to the Purchase Order before receiving the material.

[fol. 264] Now, in order that this record shall present a complete including of documents and papers used in pro-

curement procedure of Carbide & Carbon, I will ask you to file certain exhibits. The first is to be filed as Exhibit 3, which is a Purchase Requisition, being the same paper filed as page 1 of Exhibit B to the original bill in the first Carbide & Carbon case. Do you identify that as an accurate copy of that Purchase Requisition and file it as Exhibit 3° to the testimony of Complainants?

A. That is our form and that is a typical copy of the

Requisition in question. I so file.

COMPLAINANTS' EXHIBIT 3

Oral Rhinehart

Q. Is that a typical requisition form?

A. Yes, it is.

Q. With whom do requisitions originate, employees of Carbide & Carbon or employees of the Atomic Energy Commission?

A. They originate with the employees of Carbide & Car-

bon.

Q. I will ask you to file next, as Exhibit No. 4 the paper which I now hand you, and ask you to tell us what it is?

A. That is a request for quotations sent out to various prospective vendors as mailed by the Purchase Department in order to secure bids on the desired materials. I so file.

COMPLAINANTS' EXHIBIT 4

Oral Rhinehart

[fol. 265] Q. Is that the first paper that is prepared and sent out after the requisition is received?

A. Yes, it is.

Q. Has that form been in use by Carbide & Carbon since it started operations here?

A. To the best of my knowledge, it has been the same

form or similar form.

Q. Containing substantially all of the same material?

A. Yes, the same matter, that's right.

Q. Do you commonly refer to that form Exhibit 4 as an "Inquiry"?

A. That's right.

Q. I next hand you the Inquiry Form for Y-12 and ask you to identify that and file it as Exhibit 5?

A. That is a form used by the Y-12 plant.

Q. When did Carbide & Carbon take over operation of the Y-12 plant?

. A. May 1st, 1947.

Q. Has that same form been used since you took over Y-12?

A. I believe so, the same form has been used.

Q. And you file that as Exhibit 51.

A. Yes.

COMPLAINANTS' EXHIBIT 5

Oral Rhinehart

[fol. 266] Q. I next hand you Inquiry Form for plant X-10 and ask you to identify that and file it as Exhibit 6.

A. That is the form that is used as an Inquiry Form at plant X-10 and I will file it as Exhibit 6.

COMPLAINANTS' EXHIBIT 6

Oral Rhinehart

Q. When did Carbide & Carbon take over X-10?

A. March 1st, 1948.

Q. Has that same form been used since taking over X-10?

A. To the best of my knowledge, it has been used.

- Q. I next ask you to refer again to Exhibit "B" to the original bill and identify and file the Purchase Order therein set forth.
- A. The Purchase Order set forth is a photostatic copy of Purchase Order 27709.
- Q. Is that the Purchase Order form that has been used by Carbide & Carbon since it started operations here?

A. Yes, it is.

Q. Do you identify that as being an accurate copy of the Purchase Order actually used in the purchase from the Fisher Scientific Company?

A. I do.

Q. And you file it as Exhibit 7?

A. I do.

COMPLAINANTS' EXHIBIT 7

Oral Rhinehart

[fol. 267] Q. Calling your attention to certain statements upon this Purchase Order, has your Purchase Order Form always borne the language appearing near the top left-hand

corner "Acting under U. S. Government Contract, W-7405-ENG-26"?

A. It has always borne that inscription.

Q. I also call your attention to the typewritten letters and numbers, USA-C&CCC-192101, and ask you what that means?

A. That is the number I referred to a short time ago as being the property identification number which is stamped or placed directly on the equipment at the time of receipt.

Q. Has it been the practice to select the number and place it on the Purchase Order even before the goods are re-

ceived?

A. It was not at first but it is our established practice to do that.

Q. Can you tell us whether that practice was established as long ago as May 31, 1947, and the reason I pick that date is because the Sales Tax Act went into effect June 1st, 1947?

A. I don't know the exact date that we started this procedure, but I can say that the only reason it was never placed on there from the start is due to the fact that all of the routines and procedures just had not been worked out at the time. Mr. Bernheim may be able to tell you the exact date it started, but I don't know the exact date.

Q. Now, that Exhibit No. 7 includes the matter printed [fol. 268] on the reverse side of the Purchase Order, and I direct your attention to the first paragraph under "Terms"

and Conditions", reading as follows:

"This Order is placed for the benefit of, and is assignable to, the United States Government. Carbide & Carbon Chemical Corporation's only liability hereunder shall be to pay for material or services ordered hereunder out of funds supplied by the United States Government under Contract W-7405-ENG-26, which has agreed under such contract to supply such funds. In the event of assignment to and acceptance by the Government seller agrees to look solely to the Government for payment under this Order. This Order does not bind or purport to bind the United States Government."

Has that language always been present upon the Purchase Orders of Carbide & Carbon?

A. Yes, it has.

Q. How many copies of Purchase Orders are made, just approximately?

A. In the neighborhood of about eleven. -

Q. Do you recall whether there is any difference between

the first copy and the other copies?

A. All copies of the Purchase Order do not have these terms on the back. The original copy, all acceptance copies [fol. 269] that go to the vendors have these identical same instructions and terms.

Q. And the printed "Instructions, Terms and Conditions" appearing on the back are omitted from most of the

copies?

A. That is right, because they are work copies because information is placed on the back of the Order, such as the Invoice number.

Q. Such copies that do go to the dealer do have, however, the printed material on the back?

A. Yes.

Q. And particularly the copy signed by the dealer which you call the Acceptance Copy does contain the printed material on the reverse side?

A. That's true.

Q. Looking at the next page of Exhibit "B" to the original bill, which is the invoice of the supplier, is that a formadopted by Carbide & Carbon for the use of suppliers?

A. That's right.

Q. Do you identify the invoice of the Fisher Scientific Company heretofore filed as page 4 to Exhibit "B" to the original bill in the first Carbide & Carbon case and file it as Exhibit 8?

A. It is a photostatic copy of the original invoice received from the Fisher Scientific Company and will be filed here-

with as Exhibit 8.

COMPLAINANTS' EXHIBIT 8

Oral Rhinehart

[fol. 270] Q. Do most of the suppliers conform with the wishes of Carbide & Carbon and use this standard form of Invoice?

A. I would say 60 to 75 per cent use our standard Invoice form.

Q. Why did you adopt the idea of preparing a form of

invoice for suppliers to use?

A. For our Accounting Records it makes a much nicer file if we can have it all on the same form and same size paper, and also eliminate bills and invoices. That is all stamped in the upper right-hand corner of the vendor's invoice, which is the information we have to fill in in the invoice, and for the Audit Section it is much better if we can do that in the same place on all of the invoices.

Q. It's a matter of considerable convenience?

A. Yes.

Q. I notice that this invoice has written in it in long-hand, "USA-C&CCC-192101". Do you know when that was written on the invoice?

A. I couldn't tell you that, Mr. Fowler, when that was

placed on there.

Q. The next paper I hand you and ask you to identify and file—

A. This piece of paper just handed me is a "Stock Record Card" which we used to record what we term as [fol. 271] Class B Property and Class B Property is any item of property costing \$25.00 or more that can be identified, and its identity retained throughout the plant. This Stock Record Card is used at all installations operated by Carbide & Carbon in Oak Ridge.

Q. That Stock Record Card bears the same number 192101 as the documents relating to Fisher Scientific Company purchase bears. Does that mean that it covers the

same property covered by the other documents?

A. That's right.

Q. When is the Stock Record Card made?

A. It is made immediately upon receipt of the material.

Q. Is it made before or after the Receiving Report is prepared?

A. It is made from a copy of the Receiving Report which

is received in our property Department.

- Q. I will ask you to identify and file the Receiving Report which appears as page 4 of Exhibit B to the original bill. Is that a standard form of Receiving Report of Carbide & Carbon?
 - A. That's correct.

Q. And was used in connection with the same purchase we have been talking about?

A. Yes.

Q. When is that Receiving Report prepared? [fol. 272] A. It is prepared immediately upon receipt of the material. When I say immediately, I will say within a 24-hour period. Of course, it is not all possible within an hour, but 24 hours.

Q. Who signs it?

A. It is signed by the head of our Receiving Department.

Q. In the case of this particular Receiving Report was it Mr. Perry?

A. Yes.

Q. Who put the signature on there which appears to be W. M. Chester?

A. That's the representative of the Atomic Energy Commission.

Q. Does his signature go on there at the same time or immediately after your representative signs?

A. Immediately after.

Q. I will ask you to file that Receiving Report as Exhibit 9.

A. I file this Receiving Report as Exhibit 9.

COMPLAINANTS' EXHIBIT 9

Oral Rhinehart

Q. Now, I will ask you to file the Stock Record Card photostat as Exhibit 10.

A. The Stock Record Card photostat is filed as Exhibit

10.

COMPLAINANTS' EXHIBIT 10

Oral Rhinehart

[fol. 273] Q. With respect to the Stock Record Card, I notice that the middle column is headed, "USA Property Numbers". Does that mean that the property was regarded as being property of the United States?

A. That's right.

Q. Is this Stock Record Card form, has it been used since Carbide & Carbon started operation?

A. That's correct.

Q. And it is used as to all three of the plants?

A. That's right.

Q. Now, will you file as Exhibit 11 the photostatic copy of check which appears as page 5 of Exhibit B to the original bill?

A. I file the photostatic copy of the check as Exhibit 11.

COMPLAINANTS' EXHIBIT 11

Oral Rhinehart

Q. That was a check given by Carbide & Carbon to the supplier in payment of the item we have been talking about?

A. That's right.

Q. Will you file the "Public Voucher" as Exhixit 12 consisting of four pages the last of which is some printed matter which appears on the reverse side of one of the other pages.

A. I file Public Voucher as Exhibit 12 showing the request for reimbursement from the Atomic Energy Com-

mission.

[fol. 274], Q. And this particular voucher includes on the second page the Fisher Scientific Company item?

A. That's right.

- Q. Enclosed within red lines. Going to the second of the Carbide & Carbon cases, the first case involves the Use Tax that is where Carbide & Carbon bought property from a supplier outside of Tennessee. The second case in which the Diamond Coal Mining Company is a party involves the Sales Tax, and that is a case where Carbide & Carbon bought property from a supplier in Tennessee, and it is necessary to file a corresponding set of exhibits in that case also. The first page of Exhibit B to the original bill in the Diamond Coal Mining Company case appears to be a "Purchase Requisition" relating to the coal involved in that transaction. Will you identify and file the Diamond Coal Mining Company Purchase Requisition as Exhibit No. 13?
- A. This is a photostatic copy of the Purchase Requisition for coal to be purchased from the Diamond Coal Mining Company and I file it herewith as Exhibit 13.

COMPLAINANTS' EXHIBIT 13

Oral Rhinehart

Q. Was the same Inquiry Form used in the case of the Diamond Coal Mining Company purchase as you have already filed as an exhibit?

A. Not necessarily. Such orders as contracts for coal may be initiated, you might say, more or less on a personal [fol. 275] basis or by contacting by phone, and arranging the business particulars and so forth. Of course, the sup-

pliers of coal are more limited than the vendors of ordinary supplies, and that is the reason.

Q. Do you know whether or not any Inquiry Form was

used in this particular transaction?

A. I could not make such statement in this particular case.

Q. Would Mr. Bernheim know?

A. He might be in position to make such a statement.

Q. I will ask you to next identify and file a photostatic copy of the "Purchase Order" used in the Diamond Coal Mining Company case and file it as Exhibit 14 including both the front and back sides.

A. The photostatic copy of Purchase Order No. 33741 placing the order with the Diamond Coal Mining Company, I file herewith as Exhibit No. 14, both the front and the

back of the Purchase Order.

COMPLAINANTS' EXHIBIT 14

Oral Rhinehart

Q. Next, I ask you to identify and file the invoice from the Diamond Coal Mining Company which appears to be on a standard form provided by Carbide & Carbon as Exhibit No. 15.

A. This is a copy of the invoice received from Diamond Coal Mining Company for part of the order in question and I file it herewith as Exhibit No. 15.

[fol. 276] COMPLAINANTS' EXHIBIT No. 15

Oral Rhinehart

Q. I notice with respect to the Purchase Order and the Invoice also that apparently the USA-C&CCC number does not appear. Is that due to the difference in the kind of material, that is that coal is consumable in use?

A. That's right, it is in use and cannot be identified and

retain its identity.

• Q. I will ask you to next identify and file as Exhibit No. 16 the "Receiving Report" which appears as page 5 of Exhibit B to the original bill, which apparently covers some number of tons or carloads of coal falling under the Diamond Coal Mining Company contract?

A. This is a photostatic copy of Receiving Report cov-

ering seven carloads of coal received on the Purchase Order, and I file it herewith as Exhibit 16.

COMPLAINANTS EXHIBIT 16

Oral Rhinehart

Q. Of coarse, where a great volume of coal is ordered, it comes from time to time and you will have a great number of Receiving Reports?

A. That's correct.

Q. Do you make any Stock Record Card on coal?

A. We have a Stock Card but it is not this kind of a card.

It is more or less of a large ledger sheet.

Q. That is because of the difference in nature of coal? [fol. 277] A. Yes, in the nature of the material, that's right.

Q. Does that paper which you have described as a ledger sheet carry on it the same headings or the same notice of ownership that your Stock Record Card carries?

A. I don't believe it has that kind of a notation on those

consumable supply stocks.

Q. What is the purpose of the Stock Record sheet, to simply keep a current account of inventory?

A. That's right, it is so as to know at all times how much

coal is on hand and to control cost records.

Q. Was the attitude of Carbide & Carbon with respect to the ownership of coal or other expendable materials the same as with respect to the ownership of pulverizers, machinery and other equipment?

A. It is identically the same.

Q. Do you know whether the same inspection procedure was used with respect to coal and other expendable materials as with respect to permanent stuff?

A. Oh, yes, our procedure was exactly the same.

- Q. I next ask you to identify and file as Exhibit 17 the check of Carbide & Carbon Chemical Corporation to the Diamond Coal Mining Company, or rather a photostatic copy thereof including both the check and the attached statement?
- A. Photostatic copy of the check and the attached statement is a copy of the payment to the Diamond Coal Mining [fol. 278] Company and is filed as Exhibit 17.

Oral Rhinehart

Q. The amount in that check of course was only part payment of the whole amount contracted for?

A. That's right.

Q. I ask you to identify and file as Exhibit 18 the Public . Voucher prepared by Carbide & Carbon addressed to Atomic Energy Commission including a request for reimbursement for the amount paid to Diamond Coal Mining Company, this consisting of four pages?

A. I identify this voucher as a photostatic copy of that presented to the Atomic Energy Commission requesting reimbursement for expenditures regarding payments made to Diamond Coal Mining Company filed as Exhibit 18.

COMPLAINANTS' EXHIBIT 18

Oral Rhinehart

Q. Now, returning to the general picture, for what purpose and in what way has Carbide & Carbon-used the purchases of property which it has made under its Government contract?

A. Strictly for the operation of the plants at Oak Ridge.

Q. Can you give us some examples to fill out some of the

details in the picture.

- A. I could follow through on the coal. The coal is used to produce steam and steam to produce electricity and elec-[fol. 279] tricity in turn to operate the gaseous diffusion plant.
- Q. That was in connection with K-25?

A. That's right.

Q. And this pulverizer that was bought from the Fisher Scientific Company, Exhibit 9, what was that used for?

- A. That is possibly for the coal pulverizer. I am not sure that is the same equipment without referring to other records.
- Q. Have you had to buy materials and tools and so forth of a great number of different kinds and uses?

A. Oh, yes, of all variety of materials and tools in large

quantities.

Q. And you say all of those have been employed only in the performance of this contract and the supplements?

A. That's right.

Q. It appears from Supplement No. 8 to the contract that the Contracting Officer reserved to himself the right to designate in writing the place or places at which title to purchases should pass to the Atomic Energy Commission or the United States Government. I will now ask you, has the Contracting Officer ever exercised his rights under that provision, ever designated in writing or otherwise the place at which title to procurements pass to the United States?

A. To the best of my knowledge, he has not.

Q. Has the Contracting Officer and the representatives of [fol. 280] the Commission here at Oak Ridge been fully familiar with the practices of Carbide & Carbon in receiv-· ing property?

A. I think they have.

Q. As well as other practices in buying property?

A. That's true.

Q. And the practice has been uniformly to accept title from the vendor directly into the United States Govern-

ment at time of receipt?

A. I would say that it has always been assumed at least that the title was vested in the Government at the f.o.b. point, that is, at the vendor's factory or plant site, on the terms of the Purchase Order.

Q. Has there ever been any understanding or practice by Carbide & Carbon itself to take title to any of this property

coming under the Government contract?

A. No, never has been.

Q. Are you familiar with the inspection procedure that is gone through with at the time of receipt of goods?

A. Generally, yes.

Q. Can you tell us what it is?

A. Generally speaking, upon receipt of the material it is examined by employees of our Receiving Department. If everything is in order, Receiving Reports are prepared and routed to the Invoice Audit Section for the payment of the bills. Of course, if the goods are not in order, then the necessary steps are taken to file claims for damage or shortage.

[fol. 281] Q. I believe you made some reference to the attaching of this Government stamp or label. Just when is that done with respect to the time of receipt of goods?

A. That would be attached immediately after it is inspected and found to be in satisfactory condition.

Q. Is the label attached before the Receiving Report is completed or contemporaneous with the preparation of the Receiving Report?

A. I am not sure how it works into the procedure. Mr. Perry I am sure can tell you the exact time it is attached.

Q. Does the Government have a representative participating in the inspection made at time of receipt?

A. They did have but don't have at the present time.

Q. Did he inspect all goods received when that Government inspection procedure was being followed?

A. I don't think they checked all receipts. They spot checked to the best of my knowledge. They spot checked the receipts.

Q. You say that the Government has quit spot checking. How long has that been true?

A. I guess that was four or five or six months ago.

Q. Is the Atomic Energy Commission now relying upon the contractor's inspection, that is, Carbide & Carbon's inspection?

[fol. 282] A. They are relying on the contractor. As I understand, they still have the prerogative to check if they desire.

Q. Do you know whether or not any inspections relating to the acceptability of the goods are made by the Atomic Energy Commission after the goods are received at some later time?

A. Not to my knowledge, they don't.

Q. They do have inspections for the purpose of checking, your inventories and whether the issues of materials was authorized?

· A. That's right.

Q. Do any communications customarily pass between Carbide & Carbon and suppliers beyond the papers which we have filed and discussed here?

A. Oh, possibly letters or telegrams in connection with

the procurement of material.

Q. Do you know whether or not any suppliers have ever requested information as to the contractual relations of Carbide & Carbon with the Atom Energy Commission or the United States Government?

A. No, to my knowledge, we have had no inquiries of that

nature.

Q. What were the usual terms of payment on procurements?

A. Well, I am not sure that you consider that there were any particular terms. It depends on the vendor more than anything else, according to what his terms of sale were. [fol. 283] Q. Have you ever had any suppliers so cautious as to retain title to the goods against payment?

A. I believe we have had a case or two where they re-

quired COD.

Q. Required what?

A. They would ship on COD basis but that has been very few.

Q. Has the same procurement procedure including procedure on receipt and inspection and recording and treatment of goods been followed at all three plants?

A. Yes.

Q. So far as you know, will this procedure continue to be adhered to?

A. As far as I know, it will be.

Q. Has there been any difference in the treatment of shipments received from outside of Tennessee from those received from inside of Tennessee?

A. None whatever. Our methods of handling are exactly

the same.

Q. Does Carbide & Carbon carry any insurance on its property or these purchases which you have said Carbide & Carbon regard as Government property?

A. No. sir, no insurance.

Q. Why it that?

A. Because it is not Government policy to carry any type of insurance.

[fol. 284] Q. Referring to the photostatic, copies of the two checks which you have filed, one of them to the Fisher Scientific Company and the other one to the Diamond Coal Mining Company, they appear to be drawn on the Hamilton National Bank of Knoxville and signed by Carbide & Carbon Chemical Corporation, "Contract Account". Will you state whether or not those checks were paid out of money advanced by the United States?

A. That's right. That is the meaning of the Contract Account in connection with the Title of the Account. There are no other funds enter that Account except those ad-

vanced to us by the Government.

Q. It is not simply a reimbursement procedure but a disbursement by you of funds already advanced?

A. That's correct?

Q. Is that true also of all purchases by Carbide & Carbon under its contract with the Government?

A. That's right.

Cross-examination.

By Mr. Humphreys:

Q. During the course of your direct examination, Mr. Rhinehart, you referred to the fact that Carbide & Carbon was reimbursed by the Government. Do I understand you to mean that the Government upon your voucher repays enough money to maintain a certain fund?

[fol. 285] A. They advance us a certain sum to start off with, say they give us \$500,000.00 to operate with for a given period of time. We make expenditures out of the fund, say we spent \$100,000.00, we submit a voucher and they reimburse \$100,000.00. It is a revolving fund.

Q. They maintain a certain deposit for you against which

you can draw?

A. Yes.

Q. So when you speak of reimbursement they are actually reimbursing a fund that they maintain?

A. That's right.

Q. Now, the Purchase Order Form which you filed as an exhibit contains "Terms and Conditions" that were referred in the course of your direct examination, which are as follows, that part that I am interested in reads as follows:

"This Order is placed for the benefit of, and is assignable to, the United States Government."

I would like for you to file as an exhibit to your cross-examination a copy of the Assignment of this material that was purchased on this Purchase Order Form, the procedure of which you have described, as an exhibit to your cross-examination.

A. We have never had occasion that I know of to assign directly to the Government any material other than the facts; so far as we have been concerned, it has always been [fol. 286] there. We have never had any occasion to close

out our records. I don't know whether it is relevant to the case or not but we have accepted materials of another contractor here on the area that had been assigned to the Government and re-assigned to Carbide & Carbon. We have never had occasion to do that.

Q. Then, do I understand it that in no case has any of the material that you bought been assigned to the United

States Government in accordance with this statement?

A. That's correct.

Q. These Terms and Conditions contain this further statement:

"This Order does not bind or purport to bind the United States Government."

A. I don't know whether I can interpret the exact meaning of that or not. I believe what it means is that the vendor actually looks to Carbide & Carbon as the contractor for payment, and that since we are the contractor that they cannot look to the Government for payment.

Q. As a matter of fact, the property is sold to Carbide & Carbon and is only assignable to the Government on the

collection of a payment?

A. Well, I think as far as the vendor is concerned, he is

going to look to use for payment.

Q. And you are not authorized to use the name of the United States Government or bind the United States Gov-[fol. 287] ernment, but only to bind yourself in the making of this Purchase Order; that's correct, isn't it?

A. I believe that's correct.

Q. Your company carries on, you might say, three distinct types of operation, in its operation of K-25, X-10 and Y-12. Is that true?

A. That's right.

Q. Now, as regards its operation of K-25, your company undertakes under the Terms and Conditions of this contract to produce a specified and determined amount of material; that's correct, isn't it.

A. That's correct.

Q. The processes by which that material is produced have been more or less fixed by experimentation and you all pursue those processes under your contract in the production or the processing of that material so that it is not necessary to make purchase of materials with which to work out that

process, I mean of machinery, tools and things of that nature?

A. Well, that is partially true. Of course, our research men are always explaimenting for more efficient ways and better ways to do something and if they through their scientists figure out that there is a cheaper method or a better method for doing it we would make the necessary revisions in equipment.

Q. You then would buy the materials and supplies neces-

[fol. 288] sary to make the change in the process?

A. Yes, unless it was a major construction job when we would call on the construction contractor.

Q. When you buy the materials and supplies they are all bought on this Purchase Order?

A. The same Purchase Order form.

Q. And those materials and supplies are delivered into your possession and remain in your possession until your contract with the Government is terminated?

A. That's right.

Q. At which time you deliver the property that you have on hand together with such raw materials as have been manufactured, you deliver those over to the Government and account to the Government for them?

A. That would be true.

Q Until that time, until the time of delivery and accountability under the contracts the Government has no possession of any of those materials or supplies. They are all in your possession?

A. They are all in our possession but we are accountable to the Government at any time, whether at the close of the contract or at any time during the performance of the con-

tract.

Q. And you are supposed to have them?

A. Yes.

Q. You have possession of and use those materials and [fol. 289] supplies in producing a specified quantity of material and for the production you are paid cost plus a fixed fee: is that correct?

A. That's correct.

Q. In the production of those materials, I mean in the production of the matter that you make at your plants, without going into what it is or asking you about what it is, in your use of these materials and supplies you are not restricted or regulated or controlled by the Atomic Energy—

Commission, that is, they don't pay any representatives that undertake to tell you how to do it because actually the Atomic Energy Commission does not have the necessary know-how but that know-how is possessed by Carbide & Carbon and its representatives, and that's the reason they are employed; isn't that true!

A. That's right. -

Q. So again there actually is no reservation of control or exercise of control over the manner in which Carbide & Carbon will produce the required amount of material; is that true?

A. It is a matter of control. Of course, they have the right to tell us how much our production should be and how much they expect to have produced and the purity of the product. Of course, they have another control through budgetary control as to how much we are permitted to expend in each fiscal year.

Ifol. 2901 Q. That's determined in advance?

Q. And your contract is modified by that annual determination and you operate under that for a yearly period?

A. That's correct.

Q. As a matter of fact, I believe it has been mentioned heretofore that determination as to the amount of material you should make is made by the President of the United States under the Atomic Energy Act.

A. That could be. I am not familiar with that,

Q. Referring back to some of the exhibits you have filed, will you please explain to me these dates on Stock Record Card which is marked Exhibit No. 10. You have a copy of it there. Now, it seems that there appears on this card the dates of November 30th, 1946 and December 31st, 1946.

A. That's these two dates here (indicating).

Q. Inasmuch as this Order orginated in September, 1947, what are the debits and credits in the amount of \$305.00 on the dates of November 30th, 1946 and December

31st, 1946, why do they appear on that card?

A. At that time, I believe we were attempting to get back reconciliation of our stock cards against our journal and ledger account for property, and that date was stamped on there indicating the date we were making this reconciliation, that is, November 30th and December 31st, 1946.

O[fol. 291] Q. How would you make a reconciliation in

November and December, 1946 in regard to a property

item purchased in September, 1947?

A. This Stock Card note is carried for the same type of equipment. It is not just set up for one individual piece of property but might be set up for a dozen or more of the same type of property.

Q. In other words, the date of November 30th, 1946 would

relate to property item No. 182338?

A. That's right.

Q. Whereas, that item that you were explaining bears No. 192101?

A. That's right.

Q. And so that date up there is in relation to that other item!

A. Yes, I might explain a little further. Since there is no further entry on there after December 31, 1946, after that attempt to reconcile we gave up the idea of reconciling the balance, due to the fact that we do not put values on a great deal of the property, since it had been transferred to

us by the construction contractor without value.

Q. You have been asked on direct examination in regard to Title VIII, paragraph 4, also Supplement No. 8 of the Carbide contract in regard to title to material, tools, machinery, equipment and supplies for which Carbide & [fol. 292] Carbon is entitled to reimbursement, and you stated that so far as you are advised the Contracting Officer has never designated any point or time at which title to material, tools, machinery, equipment and supplies which have been purchased by Carbide & Carbon shall vest in the Government. I will get you to state whether or not the United States Government or the Contracting Officer on its behalf has ever executed any written notice to Carbide & Carbon of acceptance of title to any of the articles of property, material, tools, machinery, equipment and supplies, and if it has will you file such written notice as an exhibit to your corss examination?

A. To the best of my knowledge, we have never received

any written notice from the Government to that effect.

· Q. And you of course are unable to file any?

A. That's right.

Redirect examination.

By Mr. Fowler:

- Q. On cross-examination, Mr. Humphreys went into the Terms and Conditions which appear on the back of the Purchase Order, and I believe you said that your understanding would be that the supplier probably looks to Carbide & Carbon for payment instead of the United States Government. Now, I call your attention to the other words of that paragraph that he read from on the reverse side of the Purchase Order which in substance say that Carbide & Carbon shall [fol. 293] not be liable beyond the funds supplied by the Government. Was it your understanding that Carbide & Carbon did obligate itself without limit, or was its obligations restricted to those funds?
 - A. No, the obligation is restricted to the funds, certainly,
- Q. I believe you testified that this written provision has appeared on all of the Purchase Order contracts?

A. That's right.

- Q. And they become a part of the contract with every supplier?
 - A. That's correct.
- Q. So that the net result was that the Government fund was liable although the Government itself was not liable; is that correct?
- A. To clarify the statement of course you would say that the vendor would look to the corporation for payment to them, would never come directly to the Government for payment, but Carbide & Carbon is only liable for payment to that vendor from funds furnished to us by the Government.
 - Q. Just like it says on the back of the Order?
 - A. That's right.
- Q. A question came up here yesterday about the ownership of the materials which are processed by Carbide & Carbon, that is the uranium or raw material or whatever it is that comes into the plant. What is Carbide & Carbon's understanding about the ownership of the materials which it processes?

[fol. 294] A. Oh, definitely, they are Government-owned.

Q. Is that true throughout the processing procedure?

A. Yes.

Q. Such materials I believe are delivered to you by the United States Government and are not obtained from the manufacturer, not obtainable from any other source?

A. That's right.

Q. And the finished product, what do you do with it?

A. It is turned over to the Government.

- -Q. How many receiving points does Carbide & Carbon have?
 - A. We have three, one for each plant location.

Q. Is each of those a warehouse?

A. Each plant?

Q. I mean each of the receiving points, is it a warehouse?

A. No, our warehouses are actually separate from the receiving points but there are warehouses located at each of the three plants.

Q. The receiving points are buildings?

A. Yes.

Q. Are those buildings owned by the United States?

A. Yes.

Q. Are all of the plants throughout the area owned by the United States?

A. Yes.

Q. Are all of the office buildings and other structures you use and maintain at Oak Ridge owned by the United States?

[fol. 295] Yes.

Recross examination.

By Mr. Humphreys:

Q. Would you be able to say without violation of any Security Regulations whether this material that is furnished to you by the United States Government and upon which the processing is made by Carbide & Carbon, is fissionable material?

A. Would you state that question again?

Q. What I am asking you is, is such material that you spoke of on your direct examination as belonging to the United States Government and which is furnished to Carbide & Carbon for processing in these plants, fissionable material?

A. I believe I can answer that without violating the Security. It is.

And further deponent saith not.

Oral Rhinehart, by - Court Reporter.

Sworn to before me 15 December, 1948. _____, Notary Public. My commission expires _____,

[fol. 296] The next witness, Vernon L. Looney, being first duty sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your full name, your age and address.

A. Vernon L. Looney, age 37, 101 Air Lane, Oak Ridge.

Q. What is your position?

A. Supply Officer.

Q. Who is your employer?

A. Atomic Energy Commission.

Q. What are your duties?

A. Liaison Officer for the Supply Division.

Q. Have you at any time held a position as Accountable Property Agent for the Atomic Energy Commission?

A. Yes.

Q. When did you terminate your position?

A. I believe those orders were sent in last month. I think they were dated November. I don't remember the exact date.

Q. I notice that your name appears on Stock Record Card filed as an exhibit in this case. Did your duties as Accountable Property Agent relate to Carbide & Carbon operations?

A. Yes.

Q. Did they relate to all three plants?

A. Yes.

[fol. 297] Q. Now, as Accountable Property Agent, what

were your duties?

A. I was responsible from the Government's standpoint, I was the responsible agent for the Government properties in the custody of the contractor which was Carbide & Carbon and was responsible for maintaining or causing to be maintained accountability records of all properties received

at the various installations and the periodic review of the contractor's policy and appearance for the handling of the

property, storing and issuing materials.

Q. A question was asked Mr. Rhinehart here relating to Supplemental Agreement No. 8, to the Carbide & Carbon contract which provides in substance that title to purchases shall vest in the United States Government at the point designated by the Contracting Officer in writing, provided that the right of final inspection and acceptance or rejection in writing is reserved to the Contracting Officer. Now, the question was asked Mr. Rhinehart as to whether the Government has ever in writing accepted purchases by Carbide & Carbon under its contract. Can you answer that question?

A. To my knowledge, I don't have any knowledge of any specific written acceptance that the Government has ever made for contractor purchases. The policy probably has been that the Government has assumed—

Mr. Humphreys: At this point, I am going to interpose [fol. 298] an objection to these rather violent assumptions that are contrary to the written contracts and unsupported by reference to any authority.

Q. Well, you have testified that never to your knowledge has there been a written acceptance by the Government of properties purchased by the contractor, Carbide & Carbon. When did you assume responsibility for properties pur-

chased in the transaction of acquisition?

. A. There is in writing a mutual agreement between the contractor and the Contracting Officer that the Property Accountability Records maintained by the contractor are being maintained by the contractor for the Government Accountability Officer and that they are the records of the Government. At such time as the contract is terminated, or that the contractor is relieved of his responsibilities, those records may become a part of the Government records and be turned over to the Government. The physical mechanics of maintaining the record was done by the contractor personally, but the records were maintained, or I might say/that the contractor had agreed to maintain/a record which was the record of the Accountable Property Agent. I think you will find-I cannot put my finger on that correspondence right now-that is the basic reason? why the Accountable Property Agent's name appears on

the Stock Record and the basic reason that the records of the Atomic Energy Commission are stamped records of the [fol. 299] Atomic Energy Commission or the Clinton Engineer Works as the case may have been.

Mr. Humphreys: In order that the Complainants may be advised of the defendant's attitude with reference to this testimony, objection will be made at the present time that it is not the best evidence of the agreement referred to.

Q. Regardless of the letters or correspondence which you spoke of relating to possession and keeping, and later delivery over of records, let me ask you this: You have testified that it is a part of your responsibility as Accountable Property Agent for the Atomic Energy Commission, that it was your duty to keep check on property belonging to the Government in possession of Carbide & Carbon; is that right?

A. Yes.

Q. What were your instructions and what was your practice with respect to the time your responsibility started, say in a typical transaction of a purchase like here, a purchase of a bulldozer? When did your responsibility start?

A. We operated from an accountability standpoint; we operated under a specific Manual published by the Government and the provisions of that Manual provided that the Accountable Property Agent was responsible for review and supervision of the receiving policies to be sure that all materials and equipment purchased were properly received and record of receipt was made. On the basis of that, we [fol. 300] assumed that our responsibility began at the time of delivery at the plant. It was our responsibility to see that the proper record of receipt and Receiving Reports were prepared and that those Reports were prepared in sufficient detail that the equipment could be identified, and the equipment upon delivery, if it was an item we had three different classifications of property: Class A, Class B and Class C property. Class A was real estate, lands and facilities. Class B property is property which has a continuing life expectancy. It is not consumable materials. Properties of that type were given a number, what we call a property identification number. That number in general had a preface on it, "US", and for the purpose of identifying it with a specific contract like Carbide & Carbon, "C&CCC", and then that piece of property from

that point on was identified by that particular property number.

Q. Did you regard yourself as being responsible for it under your duties as Accountable Property Agent from the time it was so identified?

A. Yes.

Q. What was Class C property?

A. Class C property is consumable materials and supplies of every nature of materials and supplies, which when put into use would be incorporated into other things and lose their own individual identity.

[fol. 301] Q. Did you regard it as a part of the responsibility of your duties to account for property of Class C character from the time of receipt?

A. Yes.

Q. Now, you have mentioned or used the phrase, "from the time of delivery at the plant." Do you mean by "delivery" the time of receipt of the goods from the supplier?

A. That's right.

Q. Under that description of your understanding of the responsibility of your office and of the practices, would there have been any point in the Government making a

written acceptance of title to any property?

A. From a practical standpoint of accountability, no. We accepted title or assumed we accepted title at the time of delivery of the material, and probably a good point there might be at the time material or materials that were received in unserviceable condition were taken up in the property records and if those materials developed that they had to be returned to the vendor for adjustment they would be shipped out on a shipping order and that also was recorded in the property records.

Q. Do you mean they were treated as being goods within

your responsibility?

A. That's right. They were considered to be items of Government property even though inferior or damaged, [fol. 302] they were subject to Government control. The contractor did not ship those items from the area without making proper notation in the property records and advising the Accountable Property Agent of the action taken.

Q. You referred a moment ago to a Manual of some kind.

A. Manual TM 14-910.

Mr. Fowler: That's the same Manual, General Humphreys, that you have a copy of.

Mr. Humphreys: Yes.

Q. I believe we asked Mr. Vanden Bulck to file a copy of

certain portions of it, being paragraph—

A. In that Manual under the Sections with reference to Receiving and Inspection, there is a paragraph in the Manual which makes reference to the responsibility for Government inspection. Under the policy established a good long while ago, the representatives of the Government who participated, either on a selective check basis or on a 100 per cent basis were assigned to the Accounting Branches of the Government and at the time I took over Accountability in the Carbide & Carbon plants I questioned that particular provision in the Manual which in my opinion put certain responsibilit-es on myself as Accountable Property Agent, so I had my Field Representatives check on the contractor's receiving policies and make limited selective checks on their own basis and independent of the designated representatives of the Contracting Officer for the purpose of making a qualitative and quantitative [fol. 303] check. As I interpreted that Manual, there was a definite responsibility imposed on the Accountable Property Agent that he could not avoid.

Q. Those inspections that you refer to were made at the

time of receipt of goods?

A. Yes.

Cross-examination.

By Mr. Humphreys:

Q. Mr. Looney, you say that you interpreted the Manual one way and there was another interpretation contrary to yours, placed on it by whom?

A. It was a difference of interpretation. It was reluctance on the part of the management to make a change in

organizational structure.

Q. What management, Atomic Energy Commission?

A. That's right.

Q. What was that reluctance about, to do what?

A. They were reluctant to make a change in the organizational structure.

Q. What change?

A. Had they ever turned that responsibility over to me as Accountable Property Agent, as Technical Manual 14-910 indicates is normal policy, it would have involved assigning a group of some five individuals to my branch, and that group of four or five individuals perform the selective qualitative and quantitative check for the Government. At the same time, they had certain other duties and [fol. 304] responsibilities. The branch to which they were assigned was reluctant to release those people and attempt to redistribute the additional work alloted.

Q. So, as Accountable Property Agent, you did not have any inspectors inspecting as to quality and quantity check?

A. I did have, yes. Q. Who were they? A. Mr. Flanagan.

Q. I did not know. I thought you said that you wanted

hve and could not get them?

A. They did not turn this particular group as designated representative of the Contracting Officer over to me. They continued to function out of the Supply Section. But independent of that group, in order to fulfill my obligation, I set up some of the men assigned to my organization to make the check. It was a duplication of effort. I felt I had a certain responsibility that I could not avoid even though the responsibility was specifically assigned to another group.

Q. Now, on what basis do you state that you regarded yourself as accountable for this property, A, B and C?

A. Designated authority from the Contracting Officer, written designation.

Q. What responsibility did you have for the property, what was the nature of the responsibility that you had for it?

A. The Government policy has been for a good many years that all items of Government property have to be assigned to the responsibility of a designated individual who is an employee of the Government. That individual is [fol. 305] accountable and responsible for the proper custody and control of that property.

Q. Do you mean if a piece of that machinery breaks, you are responsible to account for it?

A. Not from a mechanical standpoint.

Q. From what standpoint?

A. Only from a physical control standpoint. Let me put it this way: If the item of property itself in the custody of the contractor becomes lost, or in the case of misappropriation of an item of property by contractor personnel or any personnel, it is the responsibility of the Accountable Property Agent to explain and justify and to gather the facts and data to support the dropping of that property from the Government records, or if it — necessary to prosecute, it is the responsibility of the Agent to request that legal proceedings be instituted.

Q. The truth about the situation is largely this: That your function is to hold the contractor accountable to de-

liver the property?

A. That's true.

Q. And you don't have possession of the property and have no control over it except to see that he has the property and turns it back at the end of the period of the contract for which he has contracted to have it: isn't that right?

A. That's basically correct.

[fol. 306] Q. So when you say you are accountable for the property, what you mean is that you hold him accountable for it?

A. Contrary to normal commercial practices the Government

Q. Just answer my question. You say you are just to hold him accountable for it?

A. That's correct. Let me add one point there that might clear in your mind—the term "accountable". In the event of misappropriation of property or loss of property in the custody of the contractor which could not be properly explained, the Accountable Property Agent is subject to prosecution for negligence of duty in the loss of Government property. Now, that may sound far-fetched, but is is a fact.

Q. Now, no custody of this property ever passed to you as the representative of the Atomic Energy Commission, did it? It remained in the contractor from the time it was delivered and remains in the contractor even now?

A. Custody is vested in the contractor.

Q. When you went out of office as the Accountable Property Agent, you had no records showing the property on hand in the hands of the contractor?

A. The records are still in the plant areas, the records

of the property.

Q. I say, did you have any such records?

A. Do I have any personally? No.

Q. Did you have any when you went out of office showing the property and where it was and who had it?

[fol. 307] A. The records are still in the plants still being

maintained there.

Q. What you mean is that the records of accountability are kept by the contractors themselves?

A. That's correct.

Q. You don't keep any such records?

A. No.

Q. When you went out of office you did not have to account to anybody for any property. You just went out of office; that's all?

A. The property responsibility or accountability was transferred from myself to another individual, a group of

individuals.

Q. So, when it came time to muster you out, you didn't have to account for the presence at a certain place of so much property here or elsewhere because you never had any of the property or never had any of the records?

A. No.

[fol. 308] Redirect examination.

By Mr. Fowler:

Q. When you say the records were kept by the contractor, notwithstanding, is it your position that the records as thus kept spelled out and described the property for which you were responsible?

A. That's true.

Q. You did not do your own clerking?

A. I did not do my own clerical work. That work is done by the contractor.

Q. During what period were you Accountable Property Agent in relation to Carbide & Carbon?

A. The K-25 plant was May, 1946.

Q. Did you take over the other two plants when Carbide & Carbon took them over?

A. That's right. I believe it was in May. I will have to check that.

Q. We have the dates or they are in the record.

A. May, 1947 in Y-12 and I think March-

Q. Anyhow, you were Accountable Property Agent with relation to K-25 from when?

A. May, 1946.

Q. And you were Accountable Property Agent with respect to Y-12 from the time Carbide & Carbon took over operation and also with respect to X-10 from the time [fol. 309] Carbide & Carbon took over operation?

A. Yes.

Recross examination.

By Mr. Humphreys:

Q. On these cost-plus contracts, I take it that the practice and procedure is something like this, and that is the case here: This contractor is furnished so much money to operate with and he buys certain materials and supplies, tooks, machinery and equipment and at the termination of his contract, he has to account to the Government Agency under whom he is employed for the money or for the tools and machinery or for their loss or destruction, and in order that you may keep a check on him, you function as the Accountable Property Agent to see that proper reports are made of such purchases and proper records are made so that the contractor can account at the end of the term of the contract for these things that have come into his possession in that fastion. Isn't that about the size of sit?

A. The accounting is done progressively. It is not an accumulation of records that they will be able to account for and turnover at the termination of the contract.

Q. But that is the object, to see that at the end of the term that all of the morey or materials and supplies are

accounted for; is that right?

A. The object is to determine progressively that the contractor is maintaining proper records and control of [fol. 310] Government property in his custody. The records are progressively reviewed.

Q. All those records contemplate a final termination of the contract when the contractor will have to account?

A. That is the only purpose that the record will serve, is to assist in the final termination of the contract, but the record, and the major benefit derived from the record is a progressive accounting.

Q. What is the object of the progressive accounting if

it is not what I have just asked you?

A. You imply that the record has no significance until contract termination. That is not it.

Q. What significance does it have?

A. They are required to submit monthly inventories, monthly reports of the status of material, equipment and supplies. They are subject to inspection by Government representatives at any time.

Q. What is the significance of that?

Mr. Fowler: You don't want to lock the door after the horse has been stolen.

The Witness: That's exactly it, or at any time that the contractor does not maintain or representatives of the Government consider proper and adequate records they can say they are.

Q. The whole thing is that when it comes time for him [fol. 311] to account he can account?

A. I disagree with you entirely on that.

Q. What is the purpose of it?.

A. The purpose is to keep the Government and its representatives advised currently.

Q. So that if they want him to account he can account.

A. He accounts progressively, but it is absolutely a contract termination.

Q. And may cause a contract termination?

A. Yes.

Q. The whole thing is to enable him to account whenever at is determined he should account?

A. In my opinion he accounts progressively as he makes his entries on the records.

And further deponent saith not.

Vernon L. Looney, by ----, Court Reporter.

Sworn to before me 15 December, 1948. _____, Notary Public. My commission expires: _____,

[fol. 312] Mr. Fowler: The Manual for Cost-Plus-A-Fixed-Fee Supply Contracts has been referred to only as TM 14-910.

Mr. Humphreys: That's right.

Mr. Fowler: The other one is referred to in general terms as the Administrative Audit Manual. I suggest that you

and Lagree that either one of us can put in the record such excerpts as he desires.

Mr. Humphreys: I make that agreement.

Mr. Fowler: All right, that will serve without cluttering up the record.

The next witness, OREN W. BERNHEIM, being first duly sworn, deposed as follows:

Direct examination.

.By Mr. Fowler:

Q. State your full name, address and occupation.

A. Oren W. Bernseim, age 46, my home address is 170 California Avenue. Assistant Purchasing Agent.

Q. For what Company are you Assistant Purchasing

Agent?

A. Carbide & Carbon Chemicals Corporation.

Q. Is your place of work here at the Clinton Engineer Project?

'A. Yes, at K-25 plant.

[fol. 313] Q. How long have you held the position of Assistant Purchasing Agent?

A. Three and one-half years.

Q. What are your duties?

- A. I have direct supervision over all buying and assist the Purchasing Agent and take his place when he is out of town.
- Q. Do your duties and responsibilities cover all three plants operated now by Carbide & Carbon?

A. Yes, they do.

Q. Have you held the same duties and responsibilities since you became Assistant Purchasing Agent some three years ago?

A Yes.

Q. Mr. Bernheim, I am not going to ask you all of the questions I originally intended to because Mr. Rhinehart has already answered most of them and to have you testify on the same thing would simply be repetition. I will, however, ask you with respect to this label or stamp that is placed on Class B properties and perhaps on Class A property, I don't know, #USA-C&CCC". Do you know

when in the process of buying a piece of goods that label

or stamp is attached?

A. Well, when we purchase property items, we immediately, before the order is typed, we immediately get from the Property Department a property number and that is put on our comparison of bids and on our Purchase Order, [fol. 314] "Property USA-C&CCC" and whatever number it is.

Q. When did that practice first start?

A. Ever since I have been with the firm.

Q. And in the case of purchases for Y-12 or X-10 you precede that legend with an "X"?

A. With a "Y".

Q. With a "Y" or "ORNL," meaning Oak Ridge National Laboratory?

A. Yes.

Q. Also another question relating to the purchase of coal. One of the cases here happens to be a case of the purchase of coal from the Diamond Coal Mining Company. It seems that in some or many instances, Carbide & Carbon has the practice of sending out an Inquiry Form to suppliers after there is a Purchase Requisition executed?

A. That's right.

Q. Do you send out Inquiry Forms in cases of proposed purchases of coals

A. Oh, yes.

Q. Do you know whether or not such a form was sent out in connection with this Diamond Coal Mining Company purchase here that is covered in the case?

A. That is usually the practice. Whether it was done in this case or not I could not state without checking the

record.

of the Diamond Coal Mining Company was to be used?

A: K-25.

Q. If such an Inquiry Form was sent out to Diamond Coal Mining Company was it on the same form as Exhibit 4 and I hand you a copy of Exhibit 4?

A. Yes, it would have been because we have been using this form for four and a half years to my knowledge. I have been with the Corporation that long and they have used that form ever since I have been with the corporation.

Q. What additional matter would have appeared on that Inquiry directed to Diamond Coal Mining Company?

A, In here (indicating) we would state the type of coal we desired and we would put the date that we would require the information back from them, and who to reply to and of course up in the top here it would be the Requisition number so we could tie into the proper Requisition, and whatever material required, when we want deliveries to start.

Q. With respect to inspection rocedure Mr. Bernheim do you know whether or not the United States Government or the Atomic Energy Commission has ever made any inspections relative to the suitability of the goods or the passing of title to them aside from the in-tial inspection at

the time of receipt of the goods?

A. Well, not to my knowledge. [fol. 316] Q. So far as contacting a supplier of goods is concerned in a typical transaction does the contract consist only of the exchange of documents in the form in which they have been filed here, that is the Inquiry Form, the Purchase Order, the Invoice of the seller and the check to the seller, normally, is the contact limited to those documents?

A. It is ...

Q. The reason I asked that is to find out whether the suppliers at any time inquire into the exact contractual rights between Carbide & Carbon and the Atomic Energy Commission under that contract?

A. Why, I think most of them understand what it is for and that is perhaps one of the reasons why we are able to get as good deliveries of things as we are able to get because they know the nature of the work being done here.

Q. They know it is urgent and important work?

A. Yes. In expediting we often express that fact too as the reason why we need materials.

Q. Have you ever had any inquiries from suppliers as to what the inspection or title passing provisions of the Carbide & Carbon/contract are?

A. Not to my knowledge, we have not had any questions like that.

Q. The same procedure has been followed in cases of purchases for all three plants, I take it? [fol. 317] A. Yes.

Q. Is there a usual f.o.b. point?

A. Well, as a rule in our inquiries we ask for it to be f.o.b. destination if it is possible, but some firms don't, that is not their usual practice and they will quote f.o.b. shipping point. The Purchase Order states there where the f.o.b.

Q. Is there any difference in procedure in cases of purchases made from suppliers outside of Tennessee from cases of purchases made from suppliers inside of Tennessee?

A. No, there is no difference.

Cross-examination.

By Mr. Humphreys:

Q. Mr. Bernheim, you did not intend to imply in the answer you made to the question on direct examination with regard to the time of inspection that there is any inspection made by anyone authorized by the United States Government to accept title to these goods and any execution of an instrument indicative of the acceptance of such title, did you?

A. I am not sure whether I quite follow what you mean there?

Q. Do you have any instrument that has been executed by anyone on behalf of the Atomie Energy Commission indicative of the acceptance by the Commission or the United States Government of title to any of these properties? If so, will you file that document as an exhibit to [fol. 318] your cross examination?

A. As far as our Department is concerned we do not have any. The only thing I have here is on certain classes of material that we buy, especially if it is over \$2,000.00, we always send it to the Atomic Energy Commission for their approval.

Q. That is a purchase that is in accordance with the contract?

A. Yes.

And further Deponent saith not.

Oren W. Bernheim, By ----, Court Reporter.

Sworn to before me, 15 December, 1948.

Notary Public. My commission expires: ——, —.



[fol. 319] The next witness,

. W. P. Perry, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your full name, age and address.

A. W. P. Perry, 44, 106 Poplar Road.

Q. What is your occupation?

A. Supervisor of Receiving and Shipping, Carbide & Carbon Chemical Corporation, K-25.

Q. How long have you had that position?

A. Four years and six months.

Q. What are your duties?

A. To receive and ship all materials into K-25 and out K-25.

Q. Do you normally have your place of work at the receiving point?

A. Yes.

Q. Do you have an office there?

A. In the same building.

Q. Are those duties restricted to K-25?

A. Yes.

Q. You don't have anything to do with X-121

A. No.

Q. Can you state whether or not X-10 and Y-12 follow the [fol. 320] same receiving practices that you are going to describe?

A. Yes, they operate under the standard practice and procedure that is handled in K-25.

Q. Now, Mr. Perry, in your own words tell us the receiv-

ing procedure at K-25.

A. The material is received either by motor express or by carload shipments; is brought into the warehouse; the Purchase Order number is taken from the packages and they are segregated. The Purchase Order number is pulled in from the office and is then sent out to the receiving warehouse and the Receiving Clerk will then take the order and open the package and first, of course, visually check it for any possible damage to the package that might have occurred on shipment. Then he will open the packages and count, visually check it by serial number on any identifying

marks on whatever he may be checking that would tie it into the Purchase Order. If there is an exception, if the material that is received is not as ordered, he makes an exception, what we call an exception on delivery. It is then turned over to the Office Section, called to his supervisor's attention and he makes whatever the necessary exception is on delivery and marks it on the face of the Purchase Order. It is then passed to a typist who compiles a Receiving Report and will put the necessary information on the [fol. 321] Receiving Report as transportation information and the material received, whether or not this material is as it has been ordered or if it has an exception on delivery. Any exception on delivery is so noted on the face of the Receiving Report and there is at the bottom of the Receiving Report a notation, "Exception on Delivery." If it is not an acceptable substitute, or if it is the wrong material shipped in the body of the Receiving Report, no information except "See Exception on Delivery" is put in the body of the Receiving Report and the information sets forth what the exception is, that the material is the wrong material ordered and is to be returned to the vendor, and then the marcial is held in the Receiving Department until such time as we have the necessary information to send back to the vendor. Any material excepted is then delivered to the Stores Department with the Receiving Report and the person receiving the material signs for it and the Receiving Report is then brought back to our office and distribution made of it.

Q. Now, this person who opens the container and checks the contents against the Purchase Order or whatever papers he has, is he employed by Carbide & Carbon?

A. Yes.

Q. Has the Atomic Energy Commission has an inspector or checker there also?

A. They have had.

[fol. 322] During what period?

A. Well, for the first, well up until September of this year.

Q. What did that man do until his services were terminated?

A. He spot checked the material after we checked it to see if it was all right and he made a tally on it the same as



we would make a Receiving Report. Of course, he made his check as he was directed to do.

Q. At any stage in the process, was a label or stamp at-

tached to the goods?

A. On property and material a tag is applied, or numbers and if it is the type of material that cannot be bradded onto the machine, a label is applied onto it and then shellacked so the label won't come off, or etched on with an etching machine.

Q. At what step in the receiving procedure is that done?

A. The minute or as soon as the Receiving Clerk sees that it is a piece of property item which the Purchase Order will indicate, he will then call the Property Clerk who is responsible for applying tags to merchandise, and he at the same time, while the package is opened, the Property Clerk will apply the property number to the package.

Q. Is that done even before preparation of the Receiving [fol. 323] Report?

A. Yes.

Q. Is it done as a routine part of the inspection upon opening of a parcel if the goods are found acceptable?

A. Yes.

Q. And if they are the kind that can be thus labeled?

Q. Yes.

Q. Has Carbide & Carbon adopted the practice of a tally-in-sheet like Roane-Anderson Company did?

A. We had it up until about a year ago and it was dis-

continued.

Q. The next paper that is prepared then under your current procedure after the receipt of goods, is the Receiving Report?

A. Yes.

Q. Are all Receiving Reports or were they, rather, up until the time the AEC inspector was taken off, were they signed by the AEC inspector?

A. Yes.

Q. Even though he only spot checked?

A. Yes.

Q. Now, on the Receiving Report filed in the first Carbide & Carbon case for the purpose of illustration, I will ask you whose signature is the last one appearing on the sheet?

A. W. M. Chester.

[fol. 324] Q. Was he the Atomic Energy Commission's representative?

A. Yes.

Q. Whose is the other signature?

A. Mine.

Q. Did you sign all such Receiving Reports?

A. Yes, except I do have an assistant who can sign in my absence.

Q. Since the Atomic Energy representative was taken off of this inspection, does the Commission rely solely upon the inspection by the contractor?

A. Yes.

Q. You have referred to the label. What actually appears on the label?

A. The first part of it is "USA-Carbide & Carbon Chemical Corporation or rather four C's, and then the number assigned. In other words, if it is No. 4682, that number would follow the four C's.

Q. Is the receiving point owned by the United States

A. Yes.

Q. I believe after the materials are received and if acceptable, thus labeled, you said that you put them in a Government warehouse?

A. Yes.

[fol. 325] Q. But if they are unacceptable property, are they also werehoused then?

A. Yes, they are held in our same building, which would be a Government warehouse, until such time as we have instructions from the Purchasing Department to return to the vendor.

Q. How many receiving points does each of the three plants have?

A. One apiece.

Q. Do you know whether or not the Atomic Energy Commission makes any inspections later on after receipt of the goods or is that beyond your jurisdiction?

A. That's beyond my jurisdiction.

Q. The practices that you have described have they been in effect since you first held your position?

A. Yes.

Q. So far as you know, they will continue to be followed?

A. Yes.

Q. Except in respect to the Atomic Energy Commission ceasing inspection?

A. Yes.

Q. And the same procedure has been employed with respect to goods coming from outside of Tennessee as well as goods coming from within Tennessee?

A. That's correct.

[fol. 326] Cross-examination.

By Mr. Humphreys:

Q. You say that those goods after you have gone through the receiving procedure are placed in a Government warehouse. You adopted the language of counsel for the Commission in answering that question. You used the words "Government warehouse". Actually, that's the warehouse in the custody of Carbide & Carbon and has been for sometime; isn't that true!

A. Yes, it is in the custody of Carbide & Carbon.

Q. And you all occupy it and you just put the material that you buy in the warehouse when you buy it?

A. Yes.

Q. That's right, isn't it?

A. Yes.

Q. What you mean to say, I take it, is that so far as you are advised—and that is merely on hearsay—that the title to that land is in the Government?

A. That's correct.

Q. Of course, you don't know even that as far as having examined any title papers?

A. No.

Q. You just heard that?

A. Yes.

And further deponent saith not.

By --- Court Reporter.

 [fol. 327] The next witness, G. M. Flanagan, being first duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. State your name, age and address, Mr. Flanagan,

A. G. M. Flanagan, 57 years old, Efficiency A-3.

Q. That's your office address?

A. No, that's my home address. The office address is up here.

Q. What is your present occupation?

· A. Well, it is more or less Liaison Officer between Carbide & Carbon and AEC

Q. Between what?

A. Between K-25 and AEC.

Q. How long have you held your present position?

A. September.

Q: 1948.

A. Yes.

Q. What was your position before that?

A. Before that time, I was in charge of receiving in K-25 and Y-12, receiving for AEC.

Q. How long have you held that position?

A. I went in that in April, 1946.

Q. You held it until about September, 1948? [fol. 328] A. Yes.

Q. During all of this time from April, 1946 have you been in the employ of the Atomic Energy Commission?

A. Yes.

Q. Was that true during 1946 or were you'an employee of the Manhattan District then?

A. In 1946, I was an employee of the Manhattan District.

Q. What were your duties while you were in charge of receiving at K-25768

A. I had the duties to perform that every shipment that came in I had men down there that did the actual checking, that is the checking of the receiving of all shipments and if we did not have but one he spot checked, supposed to be one-tenth of the material received.

Q. Was that spot checking conducted in accordance with the requirements of a Manual of some kind?

A. Yes.

Q. What Manual was that?

A. That's a Manual put out for this particular section

· by the old Manhattan District.

Q. I notice on the Receiving Report of Carbide & Carbon over the signature space provided for the AEC representative it says: "Approved in accordance with the requirements of the Administrative Audit Manual."

A. Yes. [fol. 329] Q. Is that the Manual to which you referred?

A. Yes.

Q. That Manual provided for spot and selective checks

A. Yes.

Q. How many men did you have under you to do the sinspection?

A. At one time there were four.

Q. Did they all work at one plant?

A. No, two at K-25, one at Y-12 and one at X-10.

Q. Do you know how many checkers would be at each of the places in the employed the contractor?

A. Approximately.

Q. How many?

A. At K-25 was about twelve and at X 10 about six and four at Y-12.

Q. What was the duty of each of the Atomic Energy Commission's checkers? I assume that the Atomic Energy Commission had a checker at each of the three plants?

A. Yes.

Q. What was the duty of the checker?

A. A shipment would come in and he would stay with the company checker and actually count and see that the material was all there and as to quality and quantity and also as to conditions, and any discrepancies he noted on his tally sheet, called a tally-in, which is an itemized statement of the material.

[fol. 330] Q. But that was done only on approximately ten per cent?

A. Yes.

Q. Would the checkers actually open and inspect the goods as they arrived?

A. Yes, that is the shipment was not touched until they themselves opened it.

Q. Were the goods labeled or branded in any way upon arrival?

A. Not until after they are received.

Q. Do you mean after the actual inspection of them?

A A. Yes.

Q. How soon after the actual inspection would they proceed to attach the label?

A: That depended entirely upon—that was always done before it left the receiving warehouse. Sometimes a man would number it. Other times it may be a day or two days later.

Q. That was the label that would bear the letters USA-C&CCC1

A. Yes, and then with the property number following.

Q. After receiving that order where would the goods be taken?

A. Then to the Store Section in which they were supposed to be handled from direct delivery. They might send [fol. 331] the Receiving Report to the Store Section, they have to send a man and check the material as being sent to whoever might have ordered it. Otherwise, it was picked up and sent to the Store Section that was handling it. . o

Q. Is the Atomic Energy Commission having a spot check made at points of receipt of goods?

A. No, they stopped it.

Q. Do they rely upon the contractor's checkers for that inspection?

A. Entirely.

Q. Has the Atomic Energy Commission at any time made any inspection beyond that which you have described as being made at the time of receipt of goods?

A. Not as far as I know. I did not come into that feature of it, but I do know that they did make periodical

inspections over the plant.

Q. That's over the warehouse where goods are stored?

A. Yes.

Q. Do you know what the purpose was?

A. That was the Property Accountability function and I'did not get in on that.

Q. Was Mr. Looney Accountable Property Agent at that time?

A. Yes.

Q. That was the function of his office to make the inspection? [fol. 332] A. Yes.

Q. This practice as to receipt and inspection of goods which you have described has been in effect ever since the Tennessee Sales Tax Act went into effect on June 1st, 1947?

A. That's true.

Q. And so far as you know, the current practice as you have described it will be carried on indefinitely?

A. As far as I know.

Q. There was no difference in the procedure as to goods originating outside of Tennessee from those originating within Tennessee!

A. No.

Cross-examination.

By Mr. Humphreys:

Q. As I understand it, Mr. Looney isn't any longer the Property Accountability Agent? And, in fact, is there any Property Accountability Agent now?

A. It is my understanding not.

Q. There isn't any?

A. Not so far as the Atomic Energy Commission is con-

Q. That office and all of that force has been done away with?

A. Yes.

[fol. 333] Q. That's been true for how long!

A. That was about approximately sixty days ago.

Redirect examination.

By Mr. Fowler:

Q. Was that done in order to stop a duplication of function?

A. That's true. The responsibility was shifted to the contractor without going through the duplication of records and so forth.

And Further Deponent Saith Not.

G. M. Flanagan, By — , Court Reporter.

 [fol. 334] The taking of proof on behalf of the complainants in the above styled causes was resumed at Oak Ridge, Tennessee, on April 4, 1949 at 10 o'clock, a.m., and continued by the taking of the depositions of Louis M. Groeniger, R. J. Rochstroh, Samuel R. Sapirie.

These further depositions are taken under the same agreement as stated at the time of the taking of the first

depositions beginning December 13, 1948.

Solicitor for the defendant waives the disqualification of A. C. Dore, Court Reporter to swear the witnesses, sign their names hereto and in all respects serve as if a Notary Public for Anderson County, Tennessee.

Louis M. Groeniger, being first duly sworn, deposed as follows:

Direct examination,

By Mr. Fowler:

. Q. State your full name, age and address.

A. Louis M. Groeniger, 118 Meadow Road, Oak Ridge, Tennessee; 37.

Q. What is your occupation?

A. Chief of the Industrial Personnel Branch of the Oak Ridge operations, Office Division of Organization and Personnel.

[fol. 335] Q. Is that a part of the work of the Atomic Energy Commission?

A. Yes.

Q. You are an employee of the Atomic Energy Commission?

A. Yes.

Q. How long have you held that position stated?

A. Since March 22nd, 1948.

Q. What are the duties of that position?:

A. To supervise the work done in a section known as Wage and Salary Administration Section which explores and either approves or disapproved contractors; policies for reimbursement of moneys expended on employees. I mean specifically that any expenditure of the contractor which has to do with salaries or wages and any other conditions of employment that affect the employees are part

of the purview of this Wage and Salary Administration. Other duties as Chief of the Industrial Personnel Branch has to do with advising the manager of the Oak Ridge operations through my immediate Chief, Mr. Jack Curtis, on matters pertaining to labor relations. Another duty is supervision of a Personnel Statistics Branch which is concerned not only with wages and salaries and the statistical side of employment at Oak Ridge but has to do with such [fol. 336] things as cost of living. Those three sections come under my branch; wages, labor relations and personnel statistics.

Q. What position did you hold immediately prior to

March, 19481

A. From May 5th, 1947 until March, 1948 I was chief of a section which included the wage and salary administration and the labor relations. The only difference is, I did not have this personnel statistics function.

Q. Prior to May 5th, 1947 what was your occupation?

A. From January 1st, 1946 until May 5th, 1947 I was employed as a Civil Examiner by the National Labor Relations Board working out of the Tenth Regional Office situated in Atlanta. I had a territory which was comprised of East Tennessee.

Q. Where were your headquarters?

A. My official headquarters were in Atlanta. I spent upwards of twenty days a month in East Tennessee, ranging from Bristol and Kingsport down as far as Oak Ridge.

Q. How much time would you spend on duties relating

to Oak Ridge!

- A. Well, from about July, 1946 forward, I spent about 50 per cent of my time at Oak Ridge. As a matter of fact, in February 1946 while I was still employed by the N.L.R.B., I was assigned a house here at Oak Ridge and moved my family here.
- Q. You were not an employee of the Manhattan Engineering District at the time of the execution of the con[fol. 337] tracts filed as exhibits in this case, entered into
 with Roane-Anderson Company and Carbide & Carbon
 Chemical Corporation?

A. No.

Q. I believe that the Atomic Energy Commission assumed jurisdiction over Oak Ridge January 1st, 1947?

A. That's right; at least that's my understanding.

- Q. And you were not employed by the Atomic Energy Commission until May 5th, 1947?
 - A. That's right.
- Q. From your actions in discharge of your official duties have you ascertained whether or not the Atomic Energy Commission when it assumed jurisdiction over Oak Ridge, undertook to draw together into one formal statement various provisions that had theretofore been published regulations of labor relations between employees and the contractors?
- A. Yes. Under the Manhattan District, the basic contracts such as are exhibits in this matter contain general clauses stating that the contractor would be reimbursed for moneys expended on employment and everything incident thereto so long as the expenditure was covered by the specific approval of some officer of the Manhattan District. That officer was referred to as the Contracting Officer. During the three or four years of operation the authorizations for reimbursement were in various forms. Some of these forms would be actual reimbursement authorizations based on the decisions of the Wage and Salary Administra-[fol. 338] tion Agency of the Government. I believe the correct title was Wage Administration Agency. It might have been Salary Stabilization Agety. Some of the authorizations would be in the form of memoranda of clarification for the contractor from the Contracting Officer or possibly the memoranda would be from some higher-up in the Manhattan District than a Contracting Officer. In any event the Atomic Energy Commission must have recognized that after several years of accumulation of all these various forms of authorization, there was need for a regularized system, and as of January 1st, 1947 each contract then in existence was examined carefully by employees of the Wage Administration Section and a document such as introduced in this evidence, Reimbursement Order No. 1 for Roane-Anderson Company and Carbide & Carbon was This is Reimbursement Order No. 1.
- Q. In order to be more specific, I hand you now a mimeographed document styled, "United States Atomic Energy Commission Reimbursement Order", consisting of 23 pages with six attachments thereto bearing on the 21st page of the Reimbursement Order the signature of Jack Curtis and ask you if this is the Reimbursement Order to which you

refer in the case of Carbide & Carbon Chemical Corporation?

- A. Yes, in the upper right-hand corner I notice this No. 1.
- Q. I next hand you a document similarly styled except that it relates to Roane-Anderson Company rather than Carbide & Carbon Chemical Corporation and which consists of 32 pages and bearing on the last page the signature of [fol. 339] Jack Curtis and ask you if this is the Reimbursement Order in the Roane-Anderson Company case?

A. Yes.

Q. Are those correct copies of the Reimbursement Orders with those contractors?

A. Yes.

Q. I will ask you to file in the Roane-Anderson cases the Reimbursement Order affecting the Roane-Anderson Company as Exhibit No. 27.

A. Yes, I so file it.

Q. I ask you to file that Reimbursement Order affecting Carbide & Carbon Chemical Corporation as Exhibit No. 19 in the Carbide & Carbon cases?

A. Yes.

Q. For the convenience of counsel and the Court, would you summarize the general subject matter and indicate the extent of detail of these Beimbursement Orders without

going to the extreme of a detailed statement?

A. The Disbursement Orders cover such matters as the salaries or wages paid by the contractors to the employees engaged in the work specified in these contracts. The Reimbursement Orders define the limits by which an employee may receive pay increases. They control the payment for overtime in some cases, the Reimbursement Order will control the amount of overtime which may be worked and, in any event, they always control the amount of compensation the employee will receive for overtime work. [fol. 340] They spell out how much vacation pay the employees may receive. They set forth which holidays the employees may be paid for not working. They define how much absent time an employee may be paid for, including absences because of sickness or in some rare cases for personal reasons. They cover reimbursement for subsistence and travel expenses for moving, expense to employees who are brought to the project for the convenience of the Gov-

ernment. In some cases, they provide for the return expenses. When an employee has completed his job he is sometimes entitled to reimbursement for moving himself and family and household goods back to the point of origin. The Reimbursment Order also controls the expenditure the contractor may make on health and accident insurance, retirement plan, recreation provided for employees, termination pay, and while it is not in either of these tow, occasionally on a construction contract there will be spelled out what the craftsman may receive in the way of travel . pay.

Q. If in some instance the contractor should fail to comply with this Reimbursement Order how is the contractor

penalized? .

A. Well, let's take a concrete example on that. Carbide & Carbon Reimbursement Order in attachment No. 3, page 3 of 4, the first classification listed there is a maintenance craft supervisor. It provides that the monthly salary for that man can be anywhere from \$395.00 to \$485.00 per [fol. 341] month. If the contractor wished to pay a certain craft supervisor more than \$485.00, and we did not approve it, he could either pay it out of his own pocket or just pay this maximum, which we would approve the maximum of \$485.00.

Q. In other words, departure from the limits of the Reimbursement Order is at the cost of the contractor himself?

A. That's right. Another more general example would be if he negotiated a contract with a labor union providing for ten cents an hour wage increase and when he presented that to us we said that there was no justification for the ten cents and that five cents was all he should have negotiated for, he would have had the alternative of going back to the labor union and telling them that five cents was all that he would give them or by paying the additional five cents out of his own pocket-

Q. The Reimbursement Order in both cases, that is, Roane-Anderson Company and Carbide & Carbon both were prepared under the specific authorization of certain provisions of the contract entered into by the Atomic Energy Commission with those contractors?

A. That's right. That is the general clause I referred

to earlier in each definitive document.

Q. Has it been found necessary from time to time to make changes in the Reimbursement Orders?

A. Yes.

- Q. About how many such changes have been made? [fol. 342] A. I think there are a little more than fifty supplementary Reimbursement Orders in the Carbide & Carbon contract and a few less than fifty in the Roane-Anderson contract.
- Q. Have those changes affected the general structure and scope of the original Reimbursement Order filed as an exhibit here?

A. No.

·Q. Of what then is the nature of the changes?

A. Well, in the Roane-Anderson Company pay structure for its maintenance employees was there effected by a union negotiation which was concluded shortly after the first of the year, 1947. This document R. O. 1 provided that a plumber as of January 1st 1947 could be reimbursed for \$1.44 an hour. If memory does not fail me, in late Januany, 1947 Roane-Anderson Company and the Knoxville Building Trades Council reach- an agreement which provided that that plumber should receive \$1.54 per hour. Most of the rates shown on pages 29, 30, 31 and 32 of R. O. 1 in the case of Roane-Anderson were effected by that negotiation, so we see it when the contractor presented a request for change, in Reimbursement Order I believe No. 3-2 or 3-revising the rate. From time to time there have been other revisions, but there has been no revision in the policy, procedure and methods of handling this.

Q. There has never been any abdication by the Atomic Energy Commission of the power to impose these rates

upon the contractor?

[fol. 343] A. No, there is a modification of the Roang Anderson Company contract which I might quote to demonstrate that. The Roane-Anderson Company contract was modified by Modification No. 14 on the 27th of June, 1947 and this modification became effective July 1st, 1947. Article XXX of that modification says in part:

"Any amount paid or allowance made by the contractor to any employee in excess of regulations governing the hours of work and pay, job classifications and employee policy so approved or ratified by the Contracting Officer shall be at the expense of the contractor under any pay reimbursement by the Government unless and until the Contracting Officer has so approved and ratified in writing."

In the same Article XXX of the modification there is further demonstration, which I don't believe it is necessary to quote:

Q. The contract at one point authorizes the Atomic Energy Commission to direct the contractor to discharge and pay employees that the Commission decides ought to be fired. Has the Atomic Energy Commission ever exercised that power?

A. Yes.

Q. In more than one instance? [fol. 344] A. I know of only two cases. I think there has been more persons released by the contractor at the Commission's indication rather than order but I know of two instances where it was ordered.

. Q. In other words, there has been actual instances of the exercise of that power by the Commission?

A. Yes.

Q. Mr. Groeniger, with respect to the higher salaried employees of the contractor, whom we may refer to as key personnel, does the Atomic Energy Commission have and exercise power with respect to the amounts of their salary and otherwise?

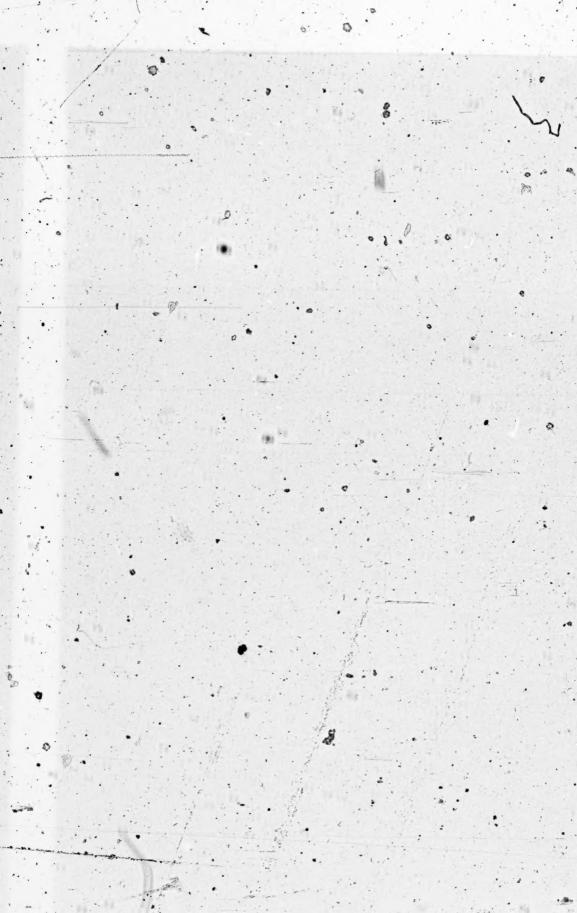
A. Yes, not only the amount of the salaries, but the Commission has the authority to exercise judgment as to whether or not the employee is qualified. Now, that is stated differently in different contracts, and, for example, I think in the Carbide & Carbon document it says the Commission must have prior review of the qualifications and it names such qualifications of key personnel.

Q. And furthermore, says their principal assistants?

A. In the matter of salaries, no contractor can hire anyone in excess of \$8,000.00 per year without Commission approval.

Q. Can we indicate what basic factors made it necessary for the Atomic Energy Commission to retain this particular control over the employment and work and the compensation of personnel of a contractor?

A. The Atomic Energy Commission is an arm of the Executive Branch of the Federal Government and it does



[fol. 345] not have the authority to delegate its responsibility for the expenditure of the taxpayer's dollar.

Q. So it has to be careful in these cost-plus situations?

A. Yes.

Q. Is there also some elements of maintenance of secrecy and to employ only reliable personnel at this particular place here?

A. Oh, yes.

Q. Have you regarded that as perhaps one of the impor-

tant reasons contributing to this personnel policy?

A. No. My answer is along a fiscal and financial line rather than the security of information and the desirability of the employee as a loyal American. My answer is based on the responsibility to the taxpayer through the Congress. I don't know of anything in the Atomic Energy Act or any other Act of Congress which could permit a government agency to tell a contractor to pay whatever wages it likes to meet different kinds of situations and that it will reimburse him later for it.

Cross-examination.

By Mr. Humphreys:

Q. It is customary as I understand it in a cost-plus-afixed-fee contract to fix limits of maximum liability of the employing government agency for the employment policies of the contractor. That's true, isn't it?

[fol. 346] A. To the best of my knowledge.

Q. What you are testifying in regard to here is in substance that representing the government agency you have established through these documents that you have filed the maximum limits of Government liability for employment policies of the contractors, and these represent the maximum limits except as they have been modified by modification orders referred to; is that true?

A. That is true. That suggests this to me: I believe there his a provision in the contract—I know there is—that if the contractor said, "Well, we can afford to pay more than this and we are going to do it", and the contractor consistently persisted in that we could cancel the contract.

Q. But after all his employment, subject to the extent that it is necessary to maintain a personnel that is not sub-

versive and is loyal, his employment policies are under his own control except as regards maximum limits of liability which are fixed in these orders.

A. As far as reimbursability, it is, yes.

Q. And that is what you are testifying in regard to?

A. Yes.

Redirect examination.

By Mr. Fowler:

Q. Did the contents of these reimbursement Orders originate with the contractors or with the Atomic Energy Com[fol. 347] mission or before that with the Manhattan District?

A. Both.

Q. Will you explain?

A. Yes. 'It is the Commission's policy, internal policy, that insofar as a contractor has home office policies which he has utilized in his private operations, we will apporve those unless and until they upset something at Oak Ridge. For example, as I understand this history of employment policies at Oak Ridge, certain Carbide & Carbon policies that they had practiced in private operations would probably not have been feasible here. The Manhattan District, therefore—I don't know whether they expressly disapproved or tacitly disapproved those policies—maybe Carbide & Carbon never requested that they be put into effect. Other policies would just have no application.

Q. To the extent that the Atomic Energy Commission found and finds contractor policies unobjectionable, the Commission adopts them as its own and embodies them

in Reimbursement Orders?

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A. Yes, except that that is not known as the Atomic Energy Commission's own policies. It is policies which the contractor is allowed to use in the exercise of the particular contract. But it does not become the policy of the Atomic Energy Commission. If I might add this, I might have gone a step further in replying to your question about maximum liability. In certain phases, for example, on a construction contract, by law there is a minimum which the contractor must follow. That is provided for in the Davis-Bacon Act.

[fol. 348] Mr. Humphreys: That is an Act of Congress?
The Witness: Yes.

Q. By saying that the Commission adopted these policies as its own are simply meant that where unobjectionable, the Commission would put in effect by its Disbursement Order the policies suggested by the contractor?

A. That's right.

Recross-examination.

By Mr. Humphreys:

Q. Actually, the sum and substance of the whole matter is that you reimburse the contractor for his expenditures under these policies which you permit him to adopt. That's the sum and substance of the matter?

A. Yes.

Q. That gets it down to the point?

A. Yes.

Q. You reimburse him to the maximum limit you have indicated?

A. Yes.

Q. But he adopts the policies and you reimburse him unless you disapprove the policy as calling for the expenditure of more money than you feel he should be authorized to expend. That, in substance, without being specific, would be correct?

A. Except that I would like to retain that one point, that he may have a policy which he wants. As a matter of fact, I [fol. 349] have written two letters last week refusing to approve policies which he has contended and demonstrated our policies he practices elsewhere.

Q. But they don't fit in here and so they are not allowed?

A. That's right.

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And further deponent saith not.

Louis M. Groeniger. By ----, Court Reporter.

Sworn to before me this April 4, 1949.

Notary Public. My Commission expires: 4/14/52.

The next witness, SAMUEL R. SAPIRIE, being first duly sworn, deposed as follows on:

Direct examination.

By Mr. Fowler:

Q. State your name, age and address.

A. Age 39, 100 Ogden Circle, Oak Ridge.

[fol. 350] Q. What is your occupation?

A. I am an engineer with the Atomic Energy Commission. Q. What position do you hold with the Atomic Energy

Commission !

A. I am Director of Production and Engineering for Oak Ridge Operations.

Q. How long have you held that position?

A. I have held that position since February 1st, 1947.

Q. What are the duties of that position?

A. I am responsible for developing, recommending and directing procurements for production and process improvement of the electro-magnetic and gaseous diffusion separation plants, engineering and construction related to production and research procurements, and accountability of source and fissionable materials, developing and currently maintaining plans for mobilization, supplying natural gas and electric power, communications service, offarea facilities not otherwise assigned, and for providing staff assistants on similar matters pertaining to the Dayton Area.

Q. Mr. Sapirie, first I want to ask you about who buys and pays for the services of the utilities to the contractors?

A. I might list those individually. The electric power service is purchased by the Atomic Energy Commission under a prime contract between the Commission and the Tennessee Valley Authority. The Telephone services are purchased by the Commission under a prime contract with Southern Bell Telephone. & Telegraph Company. water is supplied with the use of Government-owned facilities that have been constructed on the area and are now [fol. 351] operated by various contractors under cost-plusa-fixed-fee type contract. The Roane-Anderson Company operates the main water system which supplies the City of

Oak Ridge, and Electro-Magnetic Plant and the Oak Ridge

National Laboratory The Cartin e

poration operates the water system that supplies the gaseous diffusion plant. The Roane-Anderson Company also operates the two sewage systems that provide for sewage disposal for the town of Oak Ridge. The Carbide & Carbon Chemical Corporation operates the sewage disposal plant at the three plants.

Q. Has the Atomic Energy Commission entered into a secontract looking to the supplying of natural gas to one or more of the plants at Oak Ridge?

A. Yes, the Atomic Energy Commission has entered into a prime government contract with the East Tennessee Natural Gas Company for the supplying of natural gas to serve the production plants and possibly the City of Oak Ridge. The Gas Company is at present applying for a Certificate of Convenience and Necessity from the Federal Power Commission, after which they will initiate construction of the pipeline from a point on the T.G.T. line near Smithville, Tennessee to Oak Ridge with use of steel pipe that is being made available under the steel industries' voluntary allocation plan. The gas will then be supplied to the Oak Ridge area for the use of the three plants and possibly the City.

[fol. 352] Q. Leaving the general subject of the services furnished by Utilities, in the case of some supplies used by these contractors, does the Government through the Atomic Energy Commission buy them itself and turn them over to the contractors?

A. There are some supplies such as nitrogen, helium and certain coded chemicals that are purchased by the Government under Government purchase orders for delivery to the plants for use in the plant operation.

Q. How about automotive equipment?

A. Automotive equipment and office equipment is purchased by the Government for use by the operating contractor.

Q. Is the distribution of steel still subject to some aalocation by somebody?

A. The Steel Industries Committee is cooperating with certain government agencies under a voluntary steel allocation system whereby they make certain quotas of steel available for use during different quarters of the year. The Atomic Energy Commission is participating in the voluntary

used by the various operating contractors for construction and operation under cost-plus-a-fixed-fee type contracts.

Q. Now, Mr. Sapirie, going to the subject of source and ifssionable material, which was referred to in the Atomic Energy Act, I want to ask you to tell us or describe to us the extent of supervision by the Atomic Energy Commission over the contractors who deal with those materials? [fol. 353] A: Well, in the first place, I might say that title to the source and fissionable materials remains with the Atomic Energy Commission. The materials are made available to the various contractors by the Commission and are carefully accounted for and controlled with use of a system of receipts, inventory and survey. The Commission uses complicated statistical analysis method to analyze the discrepancies in order to ensure against diversion of the source and fissionable material. The analyses and protective measures used by the contractors are under surveillance of Commission spresentatives periodically and surveys of the security and accountability procedures employed by the contractors are made in accordance with well-defined Commission policy.

Q. I hand you a bulletin apparently published by the Atomic Energy Commission and ask you to tell me what that is?

A. This is bulletin G. M. 95 and summarizes the Atomic Energy Commission's policy that is followed in the accounting for source and fissionable material. Its policy is defined in Washington, is transmitted to the five field offices of operation, of which Oak Ridge is one, where it is then disseminated to the field offices under Oak Ridge, with implementation in an Oak Ridge bulletin No. 96.

Q. Will you file Bulletin G. M. 95 as Exhibit No. 20 in the Carbide & Carbon Chemical Corporation cases and also [fol. 354] file Bulletin O. R. 96 as Exhibit No. 21 in the Carbide & Carbon cases?

A. Yes, I so file them.

Mr. Fowler: I state now that these bulletins are not filed in the Roane-Anderson Company cases because Roane-Anderson does not have a direct relation to the handling of source and fissionable materials.

Q. Had you completed your statement with respect to these two exhibits?

A. I might add, briefly, that G. M. 95 contains a copy of the shipping document that is used in transferring source and fissionable material between contractors and the Atomic Energy Commission's offices.

Q. What page is that on?

A. That is Exhibit 2 at the back of the Bulletin.

Q. Next to the last page?

A. Next to the last page. In the back of that form it illustrates the routing of the various copies of the S.F. shipping form. You will note that each form has copies that go to each Atomic Energy Commission office involved in the shipment, both the shipper and the receiver, and regardless of what action is taken by the contractor in shipping source and fissionable material you will find that the action of shipment is directed by the Atomic Energy Commission and then the completed shipping forms are filed in the Atomic Energy Commission offices that have responsibility for the shipment, and the Atomic Energy Commis-[fol. 355] sion has responsibility for receiving.

Q. When you speak of S.F. material, you are referring

to source and fissionable material?

A. That is right. Source material is material that contains normal uranium. Fissionable material is enhanced in the uranium 235 isotope or plutonium.

Q. Does the Atomic Energy Commission exercise any supervision during the processing of these materials?

A. Yes, the actual operations are carried on by the costplus-fixed-fee operating contractors. However, they carry on the operations in accordance with specific policies and schedules and specifications established by the Commission, and in accordance with budgets that are approved by the Commission with use of funds allocated and authorized by Congress. The Atomic Energy Commission operations offices has a production division under my office that is a plant operating group, that extends the charges, approving their time, inspecting the work being done by the operating contractor and checking and analyzing all operating reports prepared by such contractor.

Cross-examination.

By Mr. Humphreys:

Q. After the purchase of the utilities services, electricity and water, by the Atomic Energy Commission on prime

contracts, on what basis are these utilities furnished to the prime contractors, who are operating the plant here? [fol. 356] A. They are furnished to the plant operators under an arrangement whereby the Electric Power branch under the Engineering Division takes the responsibility for checking and billing from Tennessee Valley Authority and the allocation of the use of power under such billing to the various operations for cost purposes. However, there is no exchange of funds between the various contractors and the Commission for the power so furnished. We have a telemetering system that summarizes the total usage in the area, which is the basis for a single bill that is presented by Tempessee Valley Authority to the Commission and paid by a single check. The budgeting for the Tennessee Valley Authority account is handled under my offices and the operating contractors have no participation in the actual funding of the power bill. They are advised, however, of the value of the power furnished to them so that their records of the cost of production or the cost of operating the town are realistic and include all values.

Q. As a matter of fact, there has been and there is but one major source of electric energy in this whole area, and

that is the Tennessee Valley Authority?

A. With one exception. We have at K-25 a generating station of our own that produces a particular type of power for our operations.

Q. Who operates that?

A. That is operated by Carbide & Carbon Chemical Cor-[fol. 357] poration in accordance with operating procedures that have been developed and approved by the Commission on an entirely reimbursable basis.

. Q. I believe that is a very large plant and it has an enor-

mous capacity for the creation of electric energy?

A. This plant has an installed capacity of approximately 235,000 K.W. but it is usually operated at approximately two-thirds of that capacity.

Q. Now, you spoke of direct purchases by the Government

of coded chemicals and steel?

A. I did not mention steel. I included nitrogen, helium

and certain other products.

Q. I believe that this purchase by the Government of these particularly-mentioned items is made necessary by the fact that they are controlled; isn't that true?

A. No, not entirely. We sometimes make purchases for

the contractors when we can buy a little cheaper than they can. There are some firms that will give the Government 15, 20 or 25 per cent discount that object to giving it to our contractors and write to the manufacturers and explain the type of arrangement we have in which case they give our operating contractors the same discount that they give us.

Q. Now, when you buy those supplies direct, that is, when the United States or the Atomic Energy Commission buys [fol. 358] them direct, there is no sales or use tax paid on those purchases by the Atomic Energy Commission, is there—or do you know?

A. I don't know.

Mr. Fowler: It is our information that in no case of direct purchase of materials or equipment or property by the United States Government or the Atomic Energy Commission is any sales or use tax paid to the State of Tennessee.

The Witness: I might quote for you the type of answer we give various companies who sometimes question the granting to one of our contractors of the same discount they give the Government.

Q. I appreciate your offer, but I don't think it is necessisary.

· Re-direct examination.

By Mr. Fowler:

Q. There is just one simple matter which I want to clear up. I understand that there is some change currently being made in the method of handling the telephone service, that is, whereas heretofore the Atomic Energy Commission has paid the Southern Bell Telephone Company directly for all services rendered, that some change is contemplated whereby the contractor will pay directly for a part of the service?

A. That is in accordance with a policy that applies to all of our operations of trying to assign to the operating confol. 359] tractors all operating functions. Now, we are endeavoring to transfer to our operating contractors the operation of the telephones which were facilities the area. In accomplishing that, we find that we might be able to secure better service and somewhat more economically, by having most of the cost-plus-fixed-fee contractors enter nto independent arrangements with Southern Bell Telephone ompany for their own services. The contractors

operating under the Office of Community Affairs will probably enter into their own negotiations with Southern Bell Telephone & Telegraph Company. The plant operating contractors, that is, Carbide & Carbon Chemical Corporation, will probably continue to take service from Southern Bell Telephone & Telegraph Company jointly with the Atomic Energy Commission, but will probably take over the operation of the switchboard which we now operate.

Re-cross examination.

By Mr. Humphreys:

· Q. I take it that the situation is, summarizing briefly, from what your say along this line, that when the Atomic Energy Commission took over from the United States Army Engineers, it found a situation where the United States Army Engineers were engaged in a number of operations ; that could be handled by contractors, and in keeping with the Atomic Energy Commission's policy of having all of the operations handled by contractors as much as this can be done in keeping with the situation, you are turning over those services to the contractors?

[fol. 360] A. That's right. That is reflected by the large reduction in the number of direct Government employees at Oak Ridge. We now have approximately 60 per cent of the number of people we had at the time the Commission

Q. Is it the policy and the purpose of the Commission to ultimately have all of the services discharged by contractors except as regards the policy of maintaining a sur-

veillance for preservation of secrecy?

A. Not quite. The policy is to turn over to the operating contractors practically all of the direct operations. We do retain all policy-making and control functions. We retain certain of the security functions that you mentioned, such as shipment security and the patrol of the area as a whole. We refain control over source and fissionable material. We retain budgetary control and we retain over-all direction and administrative control. At the present time, we also have some other direct operations which we hope to get out of ultimately. We are still operating the communications, including both telephone and teletype. We will probably always have to retain a part of the teletype operations, which includes a cryptographic system for the transmittal of classified messages. We are now doing some work on the disposal of excess and surplus Government-owned materials that have accumulated during the construction and operating program which we hope ultimately to turn over to the operating contractor as soon as some of the [fol. 361] details can be worked out.

And Further Deponent Saith Not, Samuel R. Shapirie, by — Court Reporter.

The witness, R. J. Rochstron, being duly sworn, deposed as follows:

Direct examination.

By Mr. Fowler:

Q. Give your full name?

A. R. J. Rochstroh.

Q. Mr. Rochstroh, state your age and address.

A. 57; address, Room 146 Cambridge Hall, Oak Ridge, Tennessee.

Q. What is your occupation?

A. Traffic manager of the United States Atomic Energy Commission, Oak Ridge.

Q. What are the duties of your position?

[fol. 362] A. Handling all matters pertaining to freight, and passenger and air travel and all motor freight and express shipments.

Q. How long have you held that position?

A. From December 1st, 1942.

Q. I take it then, you were in the employ of the Manhattan District?

A. Yes.

Q. Before the Atomic Energy Commission took over?

A. Yes, in the Corps of Engineers.

Q. The principal thing I want to ask you about, Mr. Rochstroh, concerns the use of the Government bill of lading in transporting purchases to Oak Ridge, particularly purchases made by contractors at Oak Ridge. Can you tell us

in brief whether or not such shipments have been made on Government bills of lading and if the practice was terminated here?

A. Shipments were made from the vendors on Government bills of lading off and on. Sometimes, we would furnish a Government bill of lading with the purchase order. We discontinued that for the reason that so many of the original documents would become lost. Shipments would come in collect, freight charges collect and we would convert to a Government bill of lading at destination. That was really compulsory at the start, due to the railroads having land grant rates with the Government.

Q. Now, by the phrase "at the start" what do you mean? [fol. 363] A. At the start of the job here, this job.

Q. That was in 1942 under the Manhattan District?

A. Yes.

- Q. So, am I to understand that you are saying that from December, 1942 that it was compulsory to convert commercial bills of lading to Government bills of lading at destination?
- A. Yes.
 - Q. Now, how long was that practice continued?

A. Up until May 12, 1948.

Q. Now, did the Government through that process of conversion get cheaper land grant rates?

A. Yes, up to October, 1946.

- Q. And we all understand that land grant rates are cheaper than the ordinary commercial rates growing out of some relation of the Government to the land granted to the railroads?
 - A. Correct.

Q. Now, you say that in October, 1946 the Government ceased to derive any benefit from land grant rates?

A. They did, by an Act of Congress abolishing land grant rates, the 79th Congress,

Q. Do I understand that there are no longer any land grant rates anywhere in the United States?

A. So far as I know, there is none.

Q. When it became apparent in that way in October, 1946. that there was no longer any saving in transportation expenses to be effected by the use of Government bills of lading or the conversion to Government bills of lading what became the practice from October, 1946?

A. We continued to convert.

[fol. 364] Q. Why?

A. Well, it was a procedure with the contractors or the purchaser, whoever bought the material.

Q. You continued the same procedure?

A. Yes.

Q. Was it mandatory or optional after October, 1946?

A. Optional.

Q. Can you say whether or not most commercial bills of lading were converted or not?

A. I would say from that period on, most of them were because most of the materials we were receiving at that time were on Government procurement orders or contracts.

Q. Now, in the case of procurements on the order of Carbide & Carbon Chemical Corporation beginning in October, 1946 were most of them converted or not?

A. On certain commodities, yes. Minor shipments were

not converted.

Q. How about Roane-Anderson Company?

A. We converted practically everything for Roane-Anderson Company.

Q. Now, you have mentioned May, 1948. What happened then !

A. It was the change of policy between the Division of Finance of the Atomic Energy Commission and Carbide & Carbon Chemical Corporation. [fol. 365] Q. What was the change?

A. Authorizing Carbide & Carbon to pay all freight

charges.

Q. They did it with the purpose of converting to Govern-

ment bills of lading!

A. Yes. Let me clear that up: Except where it is on a Government purchase order or contract; it is still compulsory to convert.

Q. Even though there is no saving? A. Yes.

Q. In the interim period from October, 1946 to May, 1948 the conversion to Government bill of lading did effect an avoidance of the three per cent Federal transportation tax?

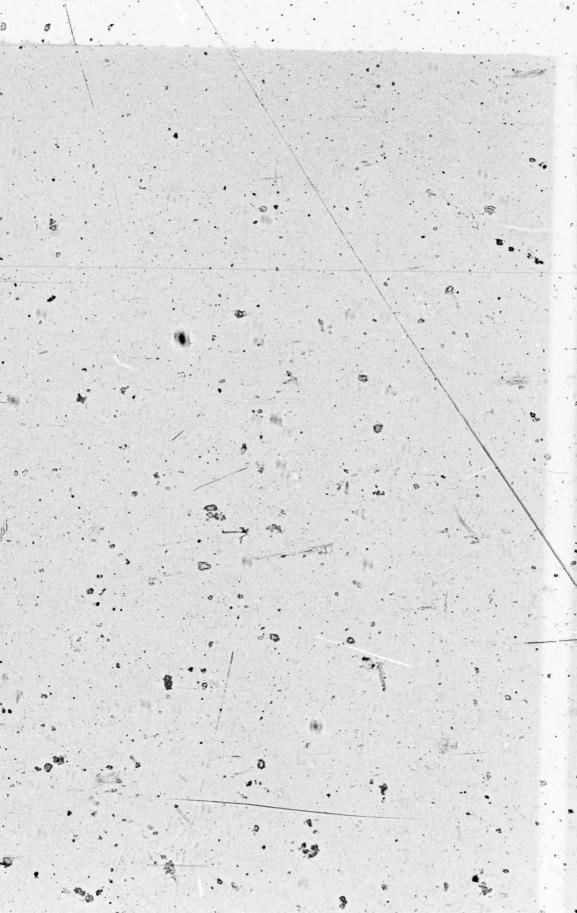
A. That is correct.

'Q. Taking the period prior to October, 1946 you have said that conversion of the bill of lading was mandatory; is that · correct ?

A. Yes.

- Q. Was that true regardless whether or not shipment was f. o. b. the vendor or f. o. b. destination?
 - A. It didn't make any difference.
- Q. Now, with particular reference to the cases here involved, Carbide & Carbon Chemical Corporation, I have certain papers I want you to examine and file. Now, for [fol. 366] the purpose of illustrating this conversion process and in order that the record may contain a more complete description of the method of handling procurements, I am going to hand you photostatic copy of the following papers: First, a bill of lading on a printed form printed apparently by the Tennessee Railroad Company, dated at Rosedale, Tennessee November 4, 1947 from Diamond Coal Mining Company relating to car No. 284291. I ask you to identify and file that as Exhibit No. 22 in the Carbide & Carbon case.
- A. I so file it.
- Q. I believe that the next step in the actual handling of the shipment would be the preparation of the freight bill by the Southern Railway Company with which railroad the Tennessee Railroad Company connects at Oneida; is that correct?
 - A. That's correct.
- Q. I therefore hand you freight bill of Southern Railway Company dated November 7, 1947 bearing Nov 20288, relating to Southern Railway car 284291 and ask you to identify and file that as Exhibit No. 23.
 - A. I so file.
- Q. In the Carbide & Carbon cases. I hand you phote-static copy of United States Government bill of lading No. A. T. 17893 and ask you to identify and file that as Exhibit No. 24 in the Carbide & Carbon case.

 [fol. 367] A. I so file it.
- Q. I notice, Mr. Rochstroh, that the Government bill of lading just filed covers not only Southern Railway Company car No. 284,291 but also a number of other shipments from the Diamond Coal Mining Company. Does that indicate that the Government bill of lading was made to cover many of the commercial bills of lading?
 - A. It is mostly done to save clerical work.
- Q. Now, finally, I hand you public voucher for transportation charges, that is, a photostatic copy, No. 4015853, and ask you to identify and file that as Exhibit No. 25 in the Carbide and Carbon case?





A. I do so.

Q. Now, Mr. Rochstroh, was the same process used in the preparation of papers in the case of Roane-Anderson Company procurements as in the case of Carbide & Carbon Chemical Corporation procurements that we have just described, namely, the issuance of a Government bill of lading?

A. Yes.

Q. And conversion and so forth?

A. Yes. I might explain something. This document prior to January 1st,—I am referring to the voucher Exhibit No. 25—prior to January 1st, 1947 all charges were paid, transportation charges were paid by the Finance Officer, United States Army, Washington, D. C., to the account of the Government until such time as the Atomic [fol. 368] Energy Commission took control of Oak Ridge.

Q. That was prior to what date?

A. January 1st, 1947.

Q. Mr. Rochstroh, do the Government bills of lading look alike so far as the printed form is concerned—and I particularly direct my question at the Government bills of lading used in the Roane-Anderson Company case; do they contain the same provisions on the gront and back in the original printed form as the Government bill of lading which you have filed as Exhibit No. 24 in the Carbide & Carbon case?

A. Yes.

Q. I will, therefore, ask you to file as Exhibit No. 28 in the Roane-Anderson Company case a photostatic copy of the same paper that you filed as Exhibit No. 24 in the Carbide & Carbon case, being United States Government bill of lading No. A. T. 17893.

A. I do so.

Cross-examination.

By Mr. Humphreys:

Q. Mr. Rochstron, this process of conversion to a Government bill of lading, does it consist of taking from the ordinary bill of lading the car numbers, weights and charges and putting those on a Government bill of lading and paying it on that basis? Is that it?

A. No. [fol. 369] Q. What does it consist of?

A. Issuance of a Government bill of lading, attaching the commercial document, shipping document and copy of the freight bill.

Q. That, of course, all occurs, I take it, after the goods have been ordered and received and the original bill is turned in to your office and then the conversion takes place; is that right?

A. Yes.

Q. So that if Carbide & Carbon Chemical Corporation—just taking a typical case—if Carbide & Carbon ordered a carload of coal and it came out—we are speaking now of the time prior to May 12, 1948—and it came out and they received the coal and a bill of lading covering the freight charges came with it, they turn it in to your office and you all put it on a Government bill of lading and pay it on the Government basis; is that right?

A. That's correct.

Q. Now, I believe you say that in October, 1946 the Congress abolished the land grant rate ben-fits?

A. That is correct.

Q. Now, I believe you say that in October, 1946 the Congress abolished the land grant rate benefits by an Act of Congress and after that time it was optional whether you made conversion or not or whether you just went ahead and [fol. 370] paid it on the original bill or convert it?

A. We converted practically everything after May 12th,

for the reason that we were saving the three per cent.

Q. Why did you stop converting on May 12th, 1948?

A. That is a policy issued by the powers to be and Carbide & Carbon.

Q. Now, Carbide & Carbon makes the purchase and pays the bill of lading?

A. That's correct.

Q. And incidentally pays the three per cent tax?

A. That's right.

Q. In other words, when it buys a carload of coal now from the Diamond Coal Mining Company, it orders the coal, it comes out and it gets the bill of lading and pays the three per cent Federal tax on the transportation?

A. Yes, on the transportation.

Q. And that has applied to shipments since May 12th, I mean the shipments to Carbide & Carbon?

A. On their own purchases, that is correct.

Redirect examination.

By Mr. Fowler:

Q. In order to get out of the three per cent Federal transportation tax, the shipment has to move on a United States Government bill of lading; is that correct?

[fol. 371] A. No, it can be converted to a Government

bill of lading.

Q. Or has to be such as that conversion will take place?

A. Yes.

Q. And it is because no conversion is contemplated in the case of shipments on Carbide & Carbon's own order, that Carbide & Carbon goes ahead and pays the three per cent tax?

A. The only exemption is given to the United States Government on the three per cent transportation tax.

Q. On its own bills of lading?

A. Yes.

Recross examination.

By Mr. Humphreys:

Q. I believe you say that the Act only exampts the United States Government and that that is not considered as applying to purchases by Carbide & Carbon on its own billing originally; is that right?

A. If Carbide & Carbon pays the carrier by check, they have to include the transportation charges, or tax rather,

of three per cent.

And further deponent saith not.

R. J. Rochstroh, by ----, Court Reporter.

[fol. 372]

STIPULATION

Mr. Fowler: It is stipulated between counsel for the parties in all four of the cases to which the testimony already taken relates as follows:

(1) That the attachment hereto marked No. 29 in the Roane-Anderson Company cases and No. 26 in the Carbide

16-5464

& Carbon Chemical Corporation cases is a photostatic copy of the regulations of the United States Atomic Energy Commission relating to control of source material to which the witness Charles Vanden Bulck referred on page 76 of his testimony, and that said exhibit may be received and considered as a part of the evidence.

(2) That the United States Government owns all of the land comprising the area known as the Chinton Engineer Works, including the town and townsite known as Oak

Ridge, Tennessee.

Have I correctly states our understanding as to this

stipulation?

Mr. Humphreys: Yes, I think I can make this stipulation in regard to what you have in mind to undertake to prove by Mr. Vanden Bulck.

It is stipulated that all of the buildings on the land comprising the area known as the Clinton Engineer Works, including the town of Oak Ridge, were built for the Government and belong to the Government and this stipulation is not to be considered as a stipulation on the part of the [fol. 373] defendant that the materials and supplies from which these buildings were constructed were the property of the Government before and at the — of incorporation into the buildings or were owned under such circumstances as to be exempt from sales or use tax liability, and our understanding is that we agree that this stipulation is not to be interpreted as being other than a fact bearing upon the issue, and does not stipulate the issue. Is that right, Mr. Fowler!

Mr. Fowler: That's right. .

[fol. 374] IN THE SUPREME COURT OF THE STATE OF TENNESSEE

CARRIDE AND CARBON CHEMICAL CORPORATION

Vs.

Sam K. Carson; Commissioner of Finance & Taxation

ROANE-ANDERSON COMPANY

VS.

Sam K. Carson, Commissioner of Finance & Taxation

DIAMOND COAL MINING COMPANY and CARBIDE & CARBON CHEMICAL CORPORATION

VS.

SAM K. CARSON, Commissioner of Finance & Taxation

WILSON-WEESNER-WILKINSON and ROANE-ANDERSON COMPANY

V8.

SAM K. CARSON, Commissioner of Finance & Taxation

PRAECIPE FOR CERTIFIED TRANSCRIPT FOR USE IN THE SUPREME COURT OF THE UNITED STATES, IN CONNECTION WITH PETITION FOR WRIT OF CERTIFICARI

[fol. 375] To the Clerk of the Supreme Court:

You are hereby requested to prepare and certify the entire record of the causes on file in the Supreme Court of Tennessee, together with the orders and opinion of that Court, except that the following portions shall be deleted:

1. Exhibit A and Exhibit B to each original bill, the same being included as Exhibits to the testimony of wit-

nesses duly filed.

2. Exhibits 1 and 2 to Stipulation dated June 7, 1949, and filed June 10, 1949, Exhibit 1 being a document published by the United States Government Printing Office entitled "A General Account of the Development of Methods of Using Atomic Energy for Military Purposes Under the Auspices of the United States Government,

1940-1945," written by H. D. Smyth, and the Exhibit 2 being page 1-22, inclusive, of the "Fifth Semi-Annual Report of the Atomic Energy Commission of the United States Government," dated January 1949, being also a document published by the United States Government, Printing Office.

It is recognized that Judicial notice may be taken of the

entire contents of said documents.

3. The following documents are also agreed to be official documents of the United States Government and Judicial notice may be taken of the entire contents. Same are, therefore, deleted from the record:

[fol. 376] Hearings before the Committee on Military Affairs—House of Representatives, Seventy-Ninth Congress, First Session on H. R. 4280, October 9 and 18, 1945.

Hearings before the Special Committee on Atomic Energy, United States Senate, Seventy-Ninth Con-

gress, Session on S. 1717, Part 1 and Part 3.

Hearings before the Special Committee on Atomic Energy, United States Senate, Seventy-Ninth Congress, First Session pursuant to S. Res. 179, Parts 1 and 3.

Hearings before the Joint Committee on Atomic Energy, Congress of the United States, Eighty-First Congress, First Session on Los Alamos Retrocession Bill and AEC Contract Policy.

Senate Document No. 96, 80th Congress, 1st Session. Letter from the Chairman and Members of the United

States Atomic Energy Commission.

Report No. 1211, 79th Congress, 2d Session, Sanate

Atomic Energy Act of 1946.

Report No. 1186, 79th Congress, 1st Session—House of Representatives—Atomic Energy Act of 1945, and Part 2 of Report No. 1186.

The exhibits filed in the consolidated causes which are not deleted by this praecipe shall be certified and transmitted to the Clerk of the Supreme Court of the United States in their original form, as allowed by the order of the Supreme Court of Tennessee.

(S.) Allison B. Humphreys, Jr., Attorney for Petitioner; James Clarence Evans, Commissioner of

Finance and Taxation of the State of Tennessee; (S.) S. Frank Fowler, Attorney for Respondents; (S.) Berryman Green, Attorney for Intervening Petitioner, United States of America.

[fol. 377]

STATE OF TENNESSEE

CITY OF NASHVILLE, Davidson County:

I, David S. Lansden, Clerk of the Supreme Court for the Middle Division of Tennessee, do certify that the Honorable A. B. Neil, Chief Justice of the Supreme Court of the State of Tennessee, who has thereunto subscribed his name, is the Chief Justice of the Supreme Court of the State of Tennessee, duly commissioned and qualified. To all whose acts as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, this the tenth day of

May, 1951.

· David S. Lansden, Clerk, Supreme Court. (Seal.)

[fol. 378]

STATE OF TENNESSEE

CITY OF NASHVILLE, Davidson County:

I, A. B. Neil, Chief Justice of the Supreme Court for the State of Tennessee, do certify that the above named David S. Lansden, by whom the foregoing attestation made, was at the time of so making the same and is now the Clerk of the said Court duly commissioned and qualified. To all whose acts as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; that the seal thereto annexed is the seal of the said Court and that said attestation so made by him is in due form.

In testimony whereof, I have hereunto set my hand, this

the tenth day of May, 1951.

A. B. Neil, Chief Justice, Supreme Court of Tennessee.

[fol. 379];

STATE OF TENNESSEE

CITY OF NASHVILLE, Davidson County:

I, David S. Lansden, Clerk of the Supreme Court for the Middle Division of Tennessee, do hereby certify that the attached transcript of the record in the case of Carbide and Carbon Chemicals Corporation vs. Sam K. Carson, Commissioner of Finance & Taxation and Diamond Coal Mining Company and Carbide & Carbon Chemicals Corporation vs. Sam K. Carson, Commissioner of Finance & Taxation is a true copy as shown by the records of this Court in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Nashville, Tennessee, this the tenth day of May, 1951.

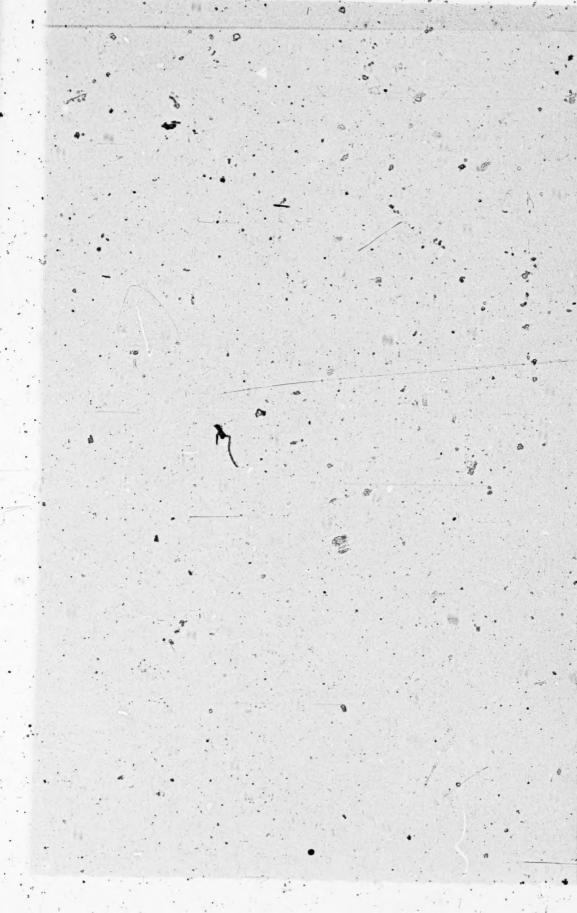
David S. Lansden, Clerk, Supreme Court. (Seal.)

[fol. 380]

Bill of Costs

For preparing record

\$199.00



[fol. 381] [Stamp:] Received May 17, 1951. Office of the Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. -

Sam K. Carson, Commissioner of Finance, etc., Petitioner,

VS.

CARBIDE AND CARBON CHEMICALS CORP., et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WHIT OF CRETIONARI

· Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 6, 1951.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 17th (seventeenth) day of May, 1951.

[fol. 382] Supreme Court of the United States, Occober Term, 1951

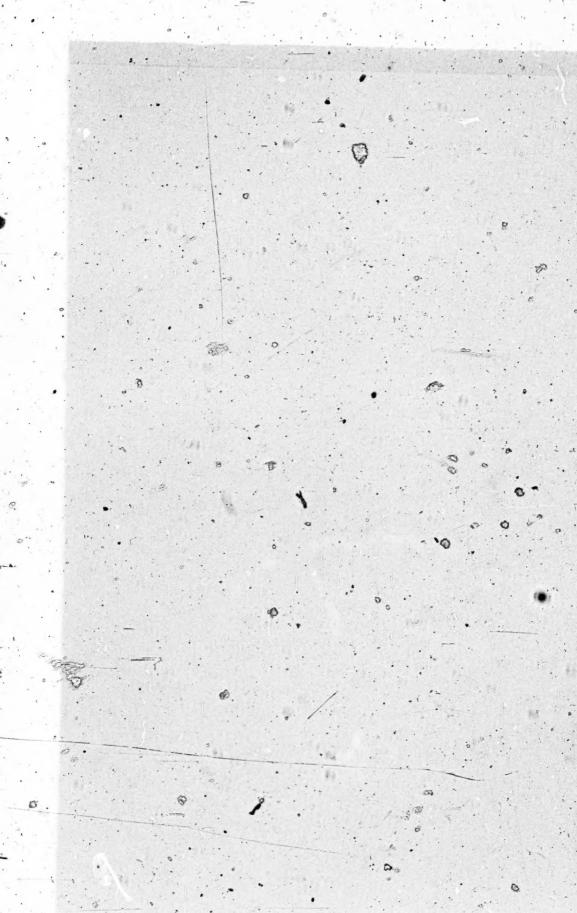
No. 187

[Title omitted]

ORDER ALLOWING CERTIORARI-Filed October 15, 1951

The petition herein for a writ of certiorari to the Supreme Court of the State of Tennessee is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



No. 186

JULA 3 1951
OFFICE OF THE CLERK
SUPPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1951.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,

Petitioner,

ROANE-ANDERSON COMPANY,

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,

Petitioner.

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDERSON COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee,
BRIEF AND ARGUMENT IN SUPPORT THEREOF.

ROY H. BEELER,
Attorney General of Tennessee,
WILLIAM F. BARRY,
Solicitor General of Tennessee,
ALLISON B. HUMPHREYS, JR.,
Assistant Attorney General of Tennessee,
Counsel for Petitioner.

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	Constitution of the U. S., Art. I, Sec. 8, clause 18; Art. IV, Sec. 3, clause 2
	Public Acts of 1947, Chap. 3, Secs. 2 (d) (e), 3 and 4
	Tennessee Retailer's Sales Act of 1947 10
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	War Powers Act, Public Law 354, 77th Congress 9 Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Secs. 1328.23, 1328.24 and 1328.25
	Textbook Cited.
	56 C. J. S., Secs. 3 (2)-3 (8), Master and Servant

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1951.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,

Petitioner,

VS.

ROANE-ANDERSON COMPANY, Respondent.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner,

VS.

WILSON-WEESNER-WILKINSON COMPANY and ROANE-ANDERSON COMPANY, Respondents.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Tennessee, BRIEF AND ARGUMENT IN SUPPORT THEREOF.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee, entered in the above entitled consolidated cases on March 9, 1951.

OPINIONS BELOW.

These cases were consolidated for trial in the Chancery Court for Davidson County, Nashville, Tennessee, and but one opinion was rendered disposing of the consolidated cases (Rec. 50). This opinion is not reported. Three opinions were filed by the Supreme Court of Tennessee: a majority opinion, a concurring opinion, and a dissenting opinion, the latter being filed by two of the five Justices who comprise that court (Rec. 7, 24, 26). These opinions are reported in 239 S. W. (2d) 27.

JURISDICTION.

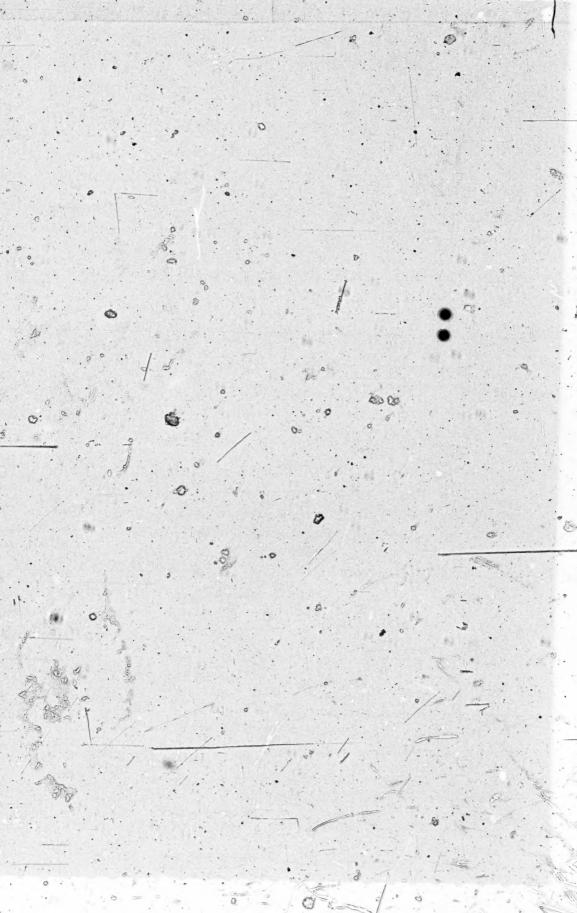
The judgment of the Supreme Court of Tennessee was entered on March 9, 1951 (Rec. 2, 3). The jurisdiction of this court is invoked under 28 U.S. C., Section 1257 (3).

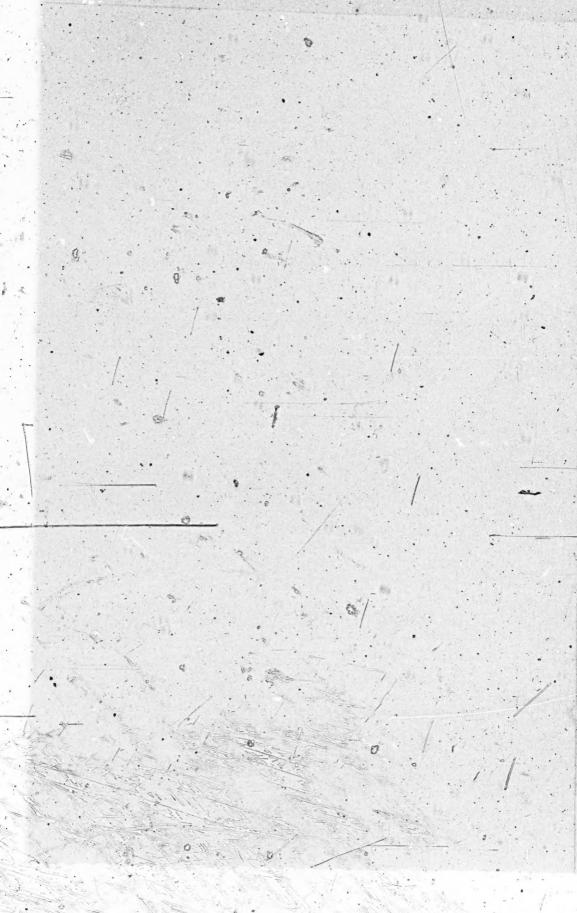
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by the original bills filed by the respondents, as complainants, in the Chancery Court for Davidson County, at Nashville, Tennessee (Rec. 31-88). The allegations of the two original bills, raising the federal question, are practically identical. The allegation in the original bill in the case of Roane-Anderson Company v. Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee, is as follows:

"Complainant particularly desires to call to the attention of the Court the provisions of Section 9 (b) of the Atomic Energy Act of 1946 reading as follows:

'In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may he in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired,





except in cases where special burgens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, County, Municipality, or any subdivision thereof.'

"The complainant alleges that all of its transactions and all of its acts entered into and performed under the contract above mentioned are activities of the Atomic Energy Commission within the intendment and purpose of Section 9 (b) of the Atomic Energy Act of 1946, and that if the Tennessee Retailer's Sales Tax Act is construed as being applicable to the activities or transactions which are herein questioned that.

Act is invalid as applied because it is repugnant to the Atomic Energy Act of 1946 including Section 9 (b) thereof and if construed as applicable to the activities or transactions as above mentioned is invalid as applied because it is repugnant to the Convalid as applied because it is repugnant to

(Excerpt from original bill in Roane-Anderson Company case, Rec. 36.)

Petitioner's answers to the original bills denied the claimed immunity; thus issue was joined on the federal question (Rec. 43, 101).

stitution of the United States."

Since these cases involve state revenue they went, on appeal, directly to the Supreme Court of Tennessee (Section 10618, Code of Tennessee). The federal question raised by the original bills and the answers thereto was

recognized by the Supreme Court of Tennessee as being determinative of the consolidated cases. This is stated in all three opinions on file (Rec. 8, 17, 24, 26, 30).

In the majority opinion it is said:

"There are numerous assignments of error. As a whole, though, these assignments go to the finding or the failure the chancellor to find facts according to the contention of the appellants. There are two contentions made by the appellants, both of which were answered contrary to their contention by the chancellor, either of which if answered in the affirmative would sustain the suits in these cases. These contentions are: (1) That the Tennessee Sales Tax Statute as applied to purchases and procurements herein is invalid and an infringement of the Federal Constitutional immunity of the means and instrumentalities employed by the United States to carry on its functions, and (2) that if there is no implied Federal Conestitutional immunity under the facts developed in this case, that then under the terms of Section 9 (b) of the Atomic Energy Act, creating this Federal agency, that Congress has exempted the property, income and activities of the Commission from State or local taxation 'in any manner or form' " (Rec. 8).

After thus stating the issues the Supreme Cours of Tennessee found the respondent Roane-Anderson Company to be an independent contractor with the Atomic Energy Commission. With respect to the second "contention," the majority opinion says:

"The second contention has given us far greater concern than the first and, as we view it, it is the question in the lawsuit" (Rec. 17).

"We are therefore of the opinion that in view of this congressional legislation the taxes in question are invalid as an unconstitutional intrusion by the State upon the performance of Federal functions. The cases are therefore reversed and a judgment will be entered here for the refund of the taxes sued for. The taxes fall directly upon activities which the Commission is carrying on through its cost reimbursement contractors. The exemption in Section 9 (b) of the Act was intended to protect such activities" (Rec. 23).

It is not anticipated that respondents will make any insistence that this court does not have jurisdiction under U. S. C., Sec. 1257 (3), to grant the petition as prayed, should the court be of opinion that said petition should in the public interest be granted.

QUESTION PRESENTED.

Chapter 3 of the Public Acts of the General Assembly for Tennessee for the year 1947 levies a general nondiscriminatory sales and use tax upon vendors selling tangible personal property at retail in Tennessee, and on those who use, store for use, distribute or consume tangible personal property in Tennessee, at the rate of 2% of the "sale price" or "cost," as defined by the act [Chap. 3, Public Acts of 1947, Sections 2 (d), 2 (e), 3 and 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sections 1328.23, 1328.24 and 1328.25].

The sales tax provisions of said act have been construed by the Supreme Court of Tennessee, the Tennessee court of last resort, as levying a privilege tax upon the vendor for the privilege of engaging in the business of making retail sales.

(Hooten v. Carson, 186 Tenn. 282, 283, 209 S. W. [2d] 273; Chap. 3, Public Acts of 1947, Section 3; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sec. 1328.24.)

The use tax feature of said act is similar to that of all other states having a general nondiscriminatory sales tax and complimentary use tax. It levies a tax upon the privilege of using, distributing or storing tangible personal property in Tennessee, after it has been brought into Tennessee and has become a part of the mass of the property in the state (Chap. 3, Acts of 1947, Sections 3 and 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sections 1328.24 and 1328.25). Credit is allowed on the use tax of sales tax paid on such tangible personal property at the point of acquisition (Chap. 3, Acts of 1947, Sec. 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supp., Vol. 2, Sec. 1328.25).

Section 9 (b) of the Atomic Energy Act of 1946, 42 U.S. C. A., 1951 Supplement, Section 1809-(b), provides, in part, as follows:

"The Commission, and the property, activities and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality or any subdivision thereof."

Respondent Roane-Anderson Company is an independent contractor operating under a cofitract with the Atomic Energy Commission at Oak Ridge, Tennessee, using tangible personal property in discharging said contract (Rec. 9, 16, 31, 39, 51, 69, 76, 84).

Respondent Wilson-Weesner-Wilkinson Company is a Tennessee vendor, who sold tangible personal property to said contractor for use in discharging said contract (Rec. 88, 91, 100).

The question presented is whether said Section 9 (b) of the Atomic Energy Act is subject to the construction placed on it by the Supreme Court of Tennessee: That it operates to exempt from sales taxation vendors who sell tangible personal property to independent contractors with the Atomic Energy Commission; and, that said Section 3 (b) prevents the State of Tennessee from levying a use tax upon the "use" of tangible personal property by such contractors in discharging their contracts with the Atomic Energy Commission.

THE STATUTE INVOLVED.

The perfinent statutory provisions are printed in Appendix A, infra, p. 47.

STATEMENT.

History of Cases.

Four suits were commenced by contractors with the Atomic Energy Commission at Oak Ridge, Tennessee, and their suppliers, in the Chancery Court for Davidson County at Nashville, Tennessee. These four suits were:

Carbide and Carbon Chemicals Corporation, hereinafter referred to as Carbide, a cost type contractor with the Atomic Energy Commission at Oak Ridge, Tennessee, brought the first suit, which was Rule Docket No. 65,014, in the Chancery Court for Davidson County, for the purpose of testing the "use" tax.

Roane-Anderson Company, hereinafter referred to as Roane-Anderson, a cost type contractor with the Atomic Energy Commission at Oak Ridge, Tennessee, brought the second suit, Rule Docket No. 65,015, in the Chaffeery Court of Davidson County, to test whether the "use" tax applied to it, its contract being in some regards different from that of Carbide.

Diamond Coal Mining Company, a Tennessee vendor, and Carbide brought the third suit, being Rule Docket No. 65,163 in said chancery court, to test the "sales" tax.

Wilson-Weesner-Wilkinson Company and Roane-Anderson brought the fourth suit, which was Rule Docket No. 65,164 in said chancery court, to test the "sales" tax.

The first and third cases, both involving Carbide and its contract, were consolidated so far as the evidence was concerned, and one transcript was filed in the Chancery Court for Davidson County and in the Supreme Court of Tennessee for both cases. For the same reasons, the second and fourth cases were consolidated and but one transcript was filed in said consolidated cases in the Chancery Court for Davidson County and in the Supreme Court of Tennessee.

After the cases were consolidated, and after the taking of depositions, leave was granted the United States to file its intervening petitions, which adopted all of the allegations and conclusions contained in the original bill and concurred in the prayers thereof (Rec. 47, 105).

While the cases were pending in the chancery court, Sam K. Carson resigned as Commissioner of Finance and Taxation of Tennessee and an order was entered substituting James Ciarence Evans, who was appointed Commissioner of Finance and Taxation, as defendant, in his place. According to the practice in Tennessee, the styles of the cases were not changed but remained as they had been at the time of the filing of the original bill (Rec. 46, 104).

The decrees of the chancery court were in favor of petitioner on all issues and respondents appealed (Rec. 85, 107).

The majority opinion of the Supreme Court was in favor of respondents on the issue made on the federal question, although it was in favor of the petitioner on the other issues.

Inasmuch as the decision of the federal question in favor of the claimed immunity prevents the State of Tennessee from collecting sales and use taxes which it deems the respondents liable for, the petitioner files this present petition. The chancellor disposed of the consolidated cases with a single opinion (Rec. 50). The Supreme Court of Tennessee has done likewise (Rec. 7). Except, that one concurring and one dissenting opinion hade been filed (Rec. 24, 26).

The contracts have been certified in the original form in which filed in the court below.

The Facts.

Respondent Roane-Anderson is a private profit type Tennessee corporation, and a cost-plus-fixed-fee contractor with the United States Atomic Energy Commission operating under contract W-7401-eng-115, at Oak Ridge, Tennessee (Rec. 16, 31, 39, 51, 69, 76, 84). Respondent Wilson-Weesner-Wilkinson Company is a private profit type Delaware Corporation domesticated in Tennessee, and is a commercial firm which sold items of tangible personal property to Roane-Anderson for use by the latter in performance of said contract with the Atomic Energy Commission (Rec. 88, 91, 100).

Respondent Roane-Anderson entered in a contract with the United States of America on November 23, 1943, as an incident to the prosecution of World War II then in progress. The contract was designated by the parties as contract W-7401-eng-115. Said contract was entered into pursuant to the War Powers Act, Public Law 354, 77th Congress. Respondent Roane-Anderson entered upon the performance of the contract and has been engaged therein ever since (Rec. 32, 40).

The contract and the amendments thereto through June 30, 1948, are Exhibits 1, 2 and 27 to the record (Rec. 32).

The Act of Congress of August 2, 1946 (Public Law 585, 79th Congress, 42 U. S. C. A. 1801 et seq.), known as the Atomic Energy Act, of 1946, duly provides for the transfer of the Atomic Energy Commission of all properties, re-

sponsibilities, duties, rights, etc., from the Government's agency, the Manhattan Engineer District of the United States Army Engineers, which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which respondent Roane-Anderson then and now maintains offices and carry on its work under said contract (Rec. 32, 40, 69, 84).

Pursuant to the provisions of said Act, the President of the United States duly issued Executive Order No. 9816, dated December 31, 1946, which transferred to and made the aforementioned contract, a contract between the Atomic Energy Commission and respondert Roane-Anderson, as of midnight December 31, 1946.

As a necessary and integral part of the work under said contracts, respondent Roane-Anderson Company purchased tangible personal property of the kind described as taxable under the Tennessee Retailers' Sales Tax Act of 1947 (Rec. 33, 41, 70, 84).

Respondent Roane-Anderson has paid the Tennessee use taxes on the purchase of property for use under its contract with the Commission and described as being subject to the use tax under statute (R. 33, 34, 41). It has also paid as a part of the purchase price of tangible personal property amounts equal to the tax levied against vendors of such property for the privilege of engaging in the business of making sales thereof in Tennessee (R. 53, 61, 71, 84). On October 15, 1947, Roane-Anderson paid petitioner Sam K. Carson, then Commissioner of Finance and Taxation of Tennessee, \$1,264.98, which sum was claimed by said petitioner to be payable as the use tax on purchases by respondent Roane-Anderson from out-of-state vendors for use under its contract with the Commission for the month of September, 1947 (R. 33, 34, 41). Said tax was paid

under protest and involuntarily and suit to recover same . was bean within the time provided by law (R. 31, 41). During November, 1947, respondent Wilson-Weesner-Wilkinson Company in the course of business sold to respondent Roane-Anderson certain items of personal property for a total sales price of \$5,705.55, which price included the sum of \$111.87, required to be added as a part of the sales price of said items of personal property by the Tennessee Retailer's Sales Tax Act. The sales transaction taking place in Tennessee, when respondent Wilson. Weesner-Wilkinson Company paid the tax provided by the Sales Tax Act on its gross sales in Tennessee, it paid \$111.87 as a tax for the privilege of engaging in the business of making sales of tangible personal property to respondent Roane-Anderson. This amount was paid under protest and involuntarily on December 19, 1947, and suit to recover the same was commenced within the time prescribed by law (Rec. 53, 61, 71, 84).

All of the property purchased by respondent Roane-Anderson asserted to be taxable was purchased solely for use under its contract with the Commission (Rec. 33, 41).

By said contract W-7401-eng-11s, as amended, respondent Roane-Anderson contracted to and has operated for the Atomic Energy Commission the town bus transportation systems, cafeterias, dormitories and the hospital, all of which are government-owned. The said respondent manages the government-owned housing facilities in Oak Ridge, Tennessee, maintains the roads and streets and utilities systems, including electricity, water and sewage disposal plant, and obtains concessionaires to operate businesses of commercial enterprises in Oak Ridge, Tennessee, using government-owned facilities (Rec. 62, 72, 73, 84, 123, 167, 168, 172, 173).

Roane-Anderson also performs certain maintenance and repair services on other government-owned buildings and properties (Rec.—see above).

The question whether, under this contract, the sale of tangible personal property to, and the use of the same by, respondent Roane-Anderson are exempt from taxation under the implication of the Constitution of the United States, was a bitterly contested issue. Both the chancellor (Rec. 54) and the Supreme Court of Tennessee (Rec. 8, 17, 23) have held, upon a consideration of the contracts and all of the evidence produced by respondent, that the sales and use transactions are not entiled to exemption from taxation on the implied immunity doctrine.

Much of the record is taken up with proof, in detail, of the manner in which articles of tangible personal property are purchased and used by respondent contractor. This proof was placed in the record by respondents in supportof their contention that the sales and use transactions are exempted from taxation by operation of the doctrine of implied constitutional immunity. As stated, the Supreme Court of Tennessee has refused to sold that these transactions are exempt from sales and use taxation under this doctrine and has beld that the same are exempt from taxation solely because of Section 9 (b) of the Atomic Energy Act.

Upon this issue, the Supreme Court of Tennessee and the chancery court, the court of original jurisdiction, have concurred, both courts finding expressly and by implication as a matter of fact, under Tennessee law, respondent contractor is an independent contractor and that on the facts and circumstances of the cases, the sales transactions and use of property would be taxable except the Supreme Court of Tennessee finds Section 9 (b) exempts from taxation.

In consideration of these holdings by the Tennessee Courts, petitioner does not deem it necessary or proper to burden the court with a recitation of the proof taken by respondent which deals with the methods by which tangible personal property was acquired by respondent contractor for use under the contract.

A part of the record consists of proof by respondents with respect to the manner in which respondent is reimbursed by the Atomic Energy Commission for expenditures made under the contract, and proof of the methods by which advancements are made to the contractor and accounted for by it. Like the other proof just referred to, this proof was directed at the issue of immunity on account of the doctrine of implied constitutional immunity from taxation and, since this doctrine has been rejected by both the Tennessee courts as not applicable under the facts, and since the decision of the case has been placed squarely on the construction of the federal statute involved, no further reference will be made to this proof.

Petitioner submits that there is no non-federal ground, on which the decision of the Suprem Court of Tennessee is based, in any part, adequate to support the judgment in these consolidated cases.

SPECIFICATION OF ERRORS.

- 1. The Supreme Court of Tennessee is in error in holding that Section 9 (b) of the Atomic Energy Act of 1946, 42 U.S.C.A., 1951 Supplement, Section 1809-(b), exempts a from sales taxation by Chap. 3 of the Public Acts of the General Assembly of Tennessee for the year 1947 vendors who sell tangible personal property to independent contractors with the Atomic Energy Commission.
- 2. The Supreme Court of Tennessee is in error in holding that Section 9 (b) of the Atomic Energy Act of 1946, 42 U.S. C.A., 1951 Supplement, Section 1809-(b), exempts respondent contractors from the use tax, levied by Chap. 3 of the Public Acts of the General Assembly of Tennessee for the year 1947, upon the "use" of tangible personal property by respondent contractors in discharging their contracts with the Atomic Energy Commission.

REASONS FOR GRANTING THE WRIT.

As matters now stand with respect to the proper interpretation of Section 9 (b), we have: (1) an opinion by the Chancery Court holding that said Section 9 (b) does not exempt the "sale" or "use" of tangible personal property from sales and use taxation when sold to or used by a contractor with the Atômic Energy Commission. (2) A majority opinion by three of the five Justices of the Supreme Court of Tennessee, holding that said Section 9 (b) does so exempt such sale and use of tangible personal property. (3) A dissenting opinion by the two remaining members of the Supreme Court of Tennessee, who agree with the chancellor, and hold that said Section 9 (b) does not exempt as claimed by respondents.

While it is recognized that this is not the character of conflict in decisions that ordinarily furnishes a basis for the granting of the writ of certiorari, still this situation does make it appear that the proper construction of said Section 9 (b) is not easily arrived at and that a final interpretation of the statute should be made by this Honorable Supreme Court of the United States.

Clearly, the question presented is one of the utmost importance to many of the States of the Union. This court will take judicial notice that the Atomic Energy Commission is presently operating on a very large scale in Tennessee and Washington. At Los Alamos, New Mexico, the Atomic Energy Commission has carried on a considerable research and development program. In addition to the projects at Oak Ridge, Tennessee, Hanford, Washington, and Los Alamos, New Mexico, the Atomic Energy Commission carries on work in California, where it works through the University of California and certain laboratories in that state; New York, where the Commission has contracts with Columbia University; Memorial Hospital

and Sloan Kettering Institute; Wisconsin, where the Commission has contracts with the University of Wisconsin; Massachusetts, where the Commission has contracts with the Massachusetts Institute of Technology and Harvard University; New Jersey, where the Commission has contracts with Sylvania Electric Company; Illinois, where the Commission has contracts with the Illineis Institute of Technology and the Argonne National Laboratory at, Chicago; the National Laboratory operated by the University of Chicago, at Chicago, Illinois; Missouri, where the Commission has contracts with Washington University in St. Louis; Colorado, where the Commission has contracts with the University of Colorado; Oregon, where the Commission has contracts with the Reed Collège: Ohio, where the Commission has contracts with the Battelle Memorial Institute at Columbus, Ohio; Iowa, where the Commission has contracts with the Iowa State College and Ames Laboratory.

In addition to these contracts for research and development, the Atomic Energy Commission has acquired large tracts of land and is preparing to erect enormous plants and spend millions of a llars in Kentucky, South Carolina, and Georgia.

The foregoing references to the extent of the activities of the Atomic Energy Commission in various States of the Union are not intended to be all inclusive but merely to illustrate that the extent of the exemption in Section 9 (b) is of the utmost importance and should be determined at the earliest opportunity.

The writ prayed for should be granted because the differences between the Atomic Energy Commission and the State of Tennessee, and other states, which have arisen and which will arise on account of said Section 9 (fi), will amount to millions of dollars. For example, while the

amounts sued for in these consolidated cases are not large, and, to the contrary, may be said to be more or less nominal, these are test cases, and sales and use taxes in the amount of two million dollars or more are involved (Rec. 7). In other States of the Union, where the program of development is only commencing, larger amounts of taxes can and will be involved.

In conclusion petitioner prays that the writ of certiorari issue.

BRIEF AND ARGUMENT In Support of Petition for Writ of Certiorari.

DISCUSSION OF SPECIFICATIONS OF ERROR.

Both of the errors specified stem from what the petitioner believes is an incorrect construction of Section 9 (b) of the Atomic Energy Act of 1946, and the specifications will be discussed on this basis.

The Atomic Energy Act of 1946 was enacted to provide federally for the development and control of Atomic energy in order that this new source of power might be utilized, first, in the common defense and security of the United States and, second, in improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace. (Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 755.)

In order to achieve these things the Atomic Energy Act provides for certain major programs. These are:

- "(1) A program of assisting and fostering private research and development to encourage maximum scientific progress;
- "(2) A program for the control of scientific and technical information which will permit the dissemination of such information to encourage scientific progress, and for the sharing on a reciprocal basis of information concerning the practical industrial application of atomic energy as soon as effective and enforceable safeguards against its use for destructive purposes can be devised;
- -"(3) A program of federally conducted research and development to assure the Government of adequate scientific and technical accomplishment;

- "(4) A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields; and
- "(5) A program of administration which will be consistent with the foregoing policies and with international arrangements made by the United States, and which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate."

(Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 755.)

The execution of these policies is assured by a provision for the appointment of an Atomic Energy Commission, a General Manager, Divisions and Directors, the appointment of a General Advisory Committee, appointment of a Military Liaison Committee, and the appointment of Army, Navy, or Air Force officers to said Military Liaison Committee. [Aug. 1, 1946, Chap. 724, Sec. 2, 60 Stat. 756, amended July 26, 1947, Chap. 343, Title II, Sec. 205 (a). 61 Stat. 501; July 3, 1948, Chap. 828, 62 Stat. 1259; Oct. 11, 1949, Chap. 673, Sections 1-3, 63 Stat. 762; Sept. 23, 1950, Chap. 1000, Sections 1, 2, 64 Stat. 979.]

Research and development are provided for by a provision in the Act requiring the Commission to foster the same (1) by contracts with and loans to private and public institutions or persons, and (2) by providing that the Commission shall engage in research and development. (Aug. 1, 1946, Chap. 724, Sec. 3, 60 Stat. 758.)

Production of fissionable material is assured by the Act. which: (1) makes the United States the exclusive owner of all facilities for the production of fissionable materials in other than experimental quantities; (2) provides that the Commission may (a) contract for the production of fissionable materials in its own facilities or (b) that the Commis-

sion may produce the material itself. (Aug. 1, 1946, Chap. 724, Sec. 4, 60 Stat. 759.)

Control of fissionable material is provided for by vesting title thereto in the Commission; regulating the distribution thereof; regulating the acquisition of such materials and facilities for production; regulating the ownership and production of source materials. (Aug. 1, 1946, Chap. 724, Sec. 5, 60 Stat. 760.)

Military application of atomic energy is provided for by authorizing the Commission: (1) to engage in research and development work in the military application of Atomic energy; (2) to engage in the production of atomic bombs, atomic bomb parts, or other military weapons. All of which is to be done only to the extent directed by the President. (Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 763.)

Utilization of Atomic Energy is authorized in certain limited instances under certain stringent licensing regulations and requirements (Aug. 1, 1946, Chap. 724, Sec. 7, 60 Stat. 764).

Provision is made for the supremacy of treaty provisions over the provisions of the Atomic Energy Act in conflict therewith (August 1, 1946, Chap. 724, Sec. 8, 60 Stat. 765).

Then comes the section dealing with the property of the Commission, in which is found Section 9 (b). By this section provision is made for the transfer to the Atomic Energy Commission of all property, interests and contracts of the United States dedicated to the production of nuclear energy or experimentation therein in the hands of other agencies. Immediately following this provision with respect to the property of the commission and as a part of the same section, follows Section 9 (b) (Aug. 1, 1946, Chap. 724, Sec. 9, 60 Stat. 765). See appendix A, page 47.

The dissemination of information concerning Atomic Energy is rigidly and extensively controlled (Aug. 1, 1946, Chap. 724, Sec. 10, 60 Stat. 766).

Patents and inventions and production in military utilization are regulated and controlled (Aug. 1, 1946, Chap. 724, Sec. 11, 20 Stat. 768).

The authority, powers and duties of the Commission are defined (Aug. 1, 1946, Chap. 724, Sec. 12, 60 Stat. 770).

Compensation, for acquisition of private property taken in the course of the execution of the act is provided for (Aug. 1, 1946, Chap. 224, Sec. 13, 60 Stat. 772).

Judicial review of administrative action is recognized and provision made therefor (Secs. 1001-1011 of Title 5, Aug. 1, 1946, Chap. 724, Sec. 14, 60 Stat. 772).

A Joint Congressional Committee is established and reports thereto are provided for (Aug. 1, 1946, Chap. 724, Sec. 15, 60 Stat. 772).

Penalties, injunctions, power of subpoena and production of documents are all provided for (Aug. 1, 1946; Chap. 724, Sec. 16, 60 Stat. 773).

Certain terms of the Atomic Energy Act are defined. The word "activities" does not appear in this list (Aug. 1, 1945, Chap. 724, Sec. 18, 60 Stat. 774).

An appropriation is then made sufficient to carry out the Act (Aug. 1, 1946, Chap. 724, Sec. 19, 60 Stat. 775).

Your petitioner contends that Section 9 (b), when read in its proper context, and in the light of congressional policy as exemplified by the past actions of Congress, simply exempts the Atomic Energy Commission from any form of taxation when it undertakes to perform any of the activities in which the Act authorizes it to engage; that the exemption is extended only to the Commission

and does not include independent contractors with the Commission.

Before discussing in detail petitioner's reasons for this view, we should like to make reference to the grounds on which the majority opinion of the Supreme Court of Tennessee is based.

The majority opinion referred to is predicated upon the following grounds: (1) The exemption should be given a broad construction. The word activities is a broad word (Rec. 20). (2) Congress knew that contractors were being employed by the United States Army Engineers in the development of Atomic Energy. Provision is made in the Act for production of fissionable materials by contractors. Therefore, contractors were included in the exemption created by the word "activities" (Rec. 21, 22). (3). Construed any other way the exemption is meaningless since the activities are carried on by operating contractors (Rec. 22). (4) "Presumptively Congress does not pass or enact useless legislation. What was the purpose of immunizing 'The Commission, and the property, activities, and income of the Commission'? These are exempt from taxation under the doctrine of implied immunity" (Rec. 22). ofederal courts in recent years have not been applying the doctrine of implied immunity from taxation "in various instances where the Government eventually bore the tax. It seems clear that Congress did not intend to leave this question to the courts but instead legislated on the question in such language as to cover all activities, etc., of the Government-owned instrumentalities" (Rec. 22). (5) "The word 'activity or activities' of course as applied to various things has various meanings but the ordinary accepted meaning of the term when applied to any particular thing is that it covers everything that the individual or the corporation does. It is so broad that it reaches a circumference of all the acts or doings of a corporation or an individual" (Rec. 23).

It is respectfully submitted that these points do not sustain the construction at which the State Court arrived.

It seems plain from reading the exemption that in speaking of activities of the Commission, Congress was not speaking of activities of the contractor, which must be an altogether different thing, if the contractor is an independent contractor and not an agent or servant.

The State Court construction is predicated on the idea that the discharge of the contract by the contractor is an activity of the Commission. It is respectfully submitted that this is not the case. This could only be true where the contractor and the Commission are one and the same in fact or in law.

Under the common law rule in Tennessee, and in other jurisdictions, activities engaged in by an independent contractor, under his contract, though for and on behalf of the other contracting party, are not to be considered the activities of the other party. Powell v. Construction Co., 88 Tenn. 692, 697; Master and Servant, 56 C. J. S., Sections 3 (2)-3 (8).

There is nothing in the Atomic Energy Act of 1946 which requires this confusion of these two separate entities. To the contrary, the Act makes it clear that Congress had in mind the Commission and, in the event the Commission saw fit to employ the same, the contractor, to carry out the act.

If, then, the Act contemplates two means by which the work is to be done, how can it be said that the exemption of one of these exempts the other? A construction which arrives at this end is not only broad, it is, and we say this respectfully, a loose construction. And while we agree that every act designed to accomplish a constitutional end should be construed so as to bring that about, broadly if need be, we do not believe this principle requires a loose construction such as has been arrived at,

As stated, two of the primary grounds relied on by the State Court to sustain its conclusion are: (1) Many contractors are employed by the Atomic Energy Commission so the exemption must apply to them; (2) a major part of the appropriation of the Atomic Energy Commission is paid the contractors, thus Congress must have intended to exempt expenditures by contractors.

It does not follow from these facts that Congress so intended.

The Act provides that the operations now carried on by contractors may be carried on by the Commission or contractors (Section 4). The exemption was written at a time when it was impossible for the Congress to know by which means the Commission would elect to carry out the program. How, then, can the fact that contractors are carrying out most of the operations and receiving the major part of the appropriations at this time have any value in determining the intent of Congress with respect to the extent of the exemption?

That there were contracts in existence at that time between contractors and the United States Army Engineers, and likely would be in the future, does not alter the situation since Congress did not require the continuation of these contracts, as indispensable to carrying out the Atomic Energy Program under the Act.

It seems far more reasonable to conclude that if Congress had intended the exemption to apply to contractors it would have said so. This is especially true in view of the care, time and attention given to the preparation of the Act (U. S. Code, Congressional Service, 79th Congress, Second Session, 1946, p. 1327).

Another ground of the State Court's majority opinion is as stated in (4) above, that the exemption is for the purpose of preserving intact the doctrine of constitutionally implied immunity from taxation. It is stated in the opinion

that in recent years the federal courts have not been applying the doctrine, and that Congress did not intend to leave this question to the courts, but legislated on it in the broadest language.

The opinion assumes that there exists a doctrine of constitutionally implied immunity from taxation which exempts contractors with governmental agencies, and that it was the intent of Congress to preserve this doctrine.

The doctrine of implied constitutional immunity is what this Court says it is. At the time Section 9 (b) was written, the opinions of this Court made it plain that the doctrine of constitutionally implied immunity from taxation would not exempt from nondiscriminatory excise taxation independent contractors working under contracts with a governmental agency. Alabama v. King & Boozer, 314 U.S. 1, 86 L. ed. 3; Curry v. U.S., 314 U.S. 14, 86 L. ed. 9; James v. Dravo Contracting Co., 302 U.S. 132, 82 L. ed. 155.

If it was the intent of Congress to preserve the implied immunity doctrine as it existed at the time the exemption was written, it would necessarily follow that independent contractors are not included within the exemption.

If it had been the intention of Congress to write an exemption to the same extent as the constitutionally implied exemption, prior to the opinions of this Honorable Court in Alabama v. King & Boozer, 314 U. S. 1, 86, and Curry v. U. S., 314 U. S. 14, 86 L. ed. 9; James v. Dravo Contracting Co., 302 U. S. 132, 82 L. ed. 155, it would have had to write into the exemption the statement that the exemption exempted contractors with it. Congress presumptively knew this and the fact that the exemption was not written this way is enough to show it was not intended that it be so construed.

The dictionary definition of the word "activities" resorted to in the majority state opinion does not sustain it.

The word "activities" is used in the exemption to define the extent of exemption. It does not relate to the object to whom the exemption is granted.

The exemption was obviously prepared with care. Precise language was employed to secure freedom from taxation of all the recognized objects thereof. Freedom from ad valorem, income and excise taxation of the Commission was assured by the exemption from taxation of its property, income and activities.

If the exemption was written as it was to cover the three main classifications of objects of taxation, then, the use of the word "activities" was not intended to exempt contractors.

If the classification, "activities", includes the contractor then, logically, the other classifications include the contractor.

We submit however that Congress had no intention to exempt either the property, the income or the activities of the contractor.

Where Congress has tied together all of the objects of taxation in one bundle and has said the Commission cannot be taxed with respect to these, a construction which unties the bundle and selects one of these objects of taxation and applies it to a different, independent, party, does, as we believe, violence to the congressional intent.

It is respectfully submitted that the exemption of activities of the Commission cannot be construed as exempting independent contractors with that Commission for so to do achieves by construction a result which Congress has refused to bring about by specific legislative enactment.

The policy of Congress in this matter was recognized and commented on in Standard Oil Co. v. Fontenot, 4 So. (2d) 634, as follows:

"The plaintiff and the intervenor assert that the authority for the execution of the contracts are two Acts of the 70th Congress, namely, Public Act 703, approved July 2, 1940, 54 Stat. 712; and Public Act 611, approved June 13, 1940, 54 Stat. 350. It appears that attempts were made to amend proposed legislation to provide for a specific exemption from State taxes for contractors under a 'cost-plus-a-fixed-fee' contract, and to legislate them into the status of an agency representing the sovereign nation. It was sought to amend Public Acts 43 (53 Stat. at L. 590-592) so as to provide that all contractors who entered into authorized contracts should be held to be agents of the United States for the purpose of such contracts. The Act was passed without the proposed amendment. Prior to the passage of Public Act 588 of the 76th Congress, 54 Stat. 265, the language therein, which would have made such contractors agents of the government and would have exempted them from all taxes-federal, state and local, was stricken therefrom in the House and was concurred in by the Senate. Cong. Rec., Vol. 80, part 7, pages 7532-7535, Amd't 1205, H. B. 8438; Cong. Rec., Vol. 86, part 7, pages 7646-7648. Therefore, when the War Department entered into the contracts in question, it was with full knowledge that Congress had refused to make such contractors agents or instrumentalities of the Government and that Congress had likewise refused to make available to such contractors a specific statutory exemption from State and local taxes" [4 So. (2d) 634].

Likewise, in State of Alabama v. King and Boozer (1941), 314 U. S. 1, 13, 86 L. ed. 3, 8, 62 S. Ct. 43, 140 A. L. R. 615, 620, reference is made to the fact that Congress has declined to pass legislation immunizing from state taxation contractors under cost-plus-contracts for the construction of governmental projects. Reference is made

in this latter case to "proposed Senate Amendment No. 120, to H. R. 8438, which became the Acts of June 11, 1940, 54 Stat. at L. 265, Chap. 313; Cong. Rec., 76th Cong., 3d Sess., Vol. 86, part 7, pp. 7518, 7519, 7527-7535, 7648."

In view of this policy of Congress to refuse to exempt contractors by the gnactment of legislation which specifically defines who are contractors and what contractors are exempt, we respectfully submit that the term "activities" was not intended to exempt contractors.

The Special Congressional Committee on atomic energy to which bills for the control of atomic energy were referred reported back S. 1717, with recommendation that it pass. This recommendation was accepted and the bill did pass and become the Atomic Energy Act of 1946. The following is the only comment of the Special Congressional Committee on Section 9 of the Atomic Energy Act of 1946, including Section 9 (b):

"Section 9, Property of the Commission.

"The Commission is to take over all resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property" (p. . 1334) (U. S. C. C. S. 79th Cong., 2d Session, 1946).

It will be noted that the only reference made by the Special Congressional Committee to the question of taxes is that "the Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property." There is nothing in the whole report to indicate that the Special Congressional Committee considered the exemption of the Commission from

taxation would exempt contractors with the Commission. To the contrary, the implication of the foregoing statement of the Committee is that the Commission understood that the exemption applied solely to the Commission, its properties, and its own operation of those properties.

It is difficult to conceive that the policy of permitting state taxation of independent contractors with the Federal Government could have been departed from without any comment thereon by the Committee. The petitioner believes that if the Special Congressional Committee which adopted the bill that became the Atomic Energy Act of 1946 had intended to exempt independent contractors with this instrumentality of the Government, the report of the Special Congressional Committee would have contained some reference to this fact and some explanation. Especially is this true when the Special Congressional Committee was careful to state that it was the intent of the Committee to undertake to reconcile as far as possible the governmental monopoly created in the field of nuclear energy with our traditional free enterprise system (Senate Report No. 1211, April 19, 1946, U. S. C. Congressional Service, 79th Congress, 2nd Session 1946).

The majority State Court construction cannot be sustained on the ground that nuclear energy has been declared to be a governmental monopoly and the exemption of independent contractors with the Commission is required on this account. The making of war, the preparation therefor, and acquisition of materials for this purpose have always been a governmental monopoly. Yet the Congress has refused to exempt independent contractors in the war effort and this Court has declined to find that the exercise of this monopolistic right so dislocates our traditional free enterprise system as to require that the operations of independent contractors engaged in producing war material be considered as governmental

agencies (Powell et al. v. U. S. Cartridge Co., 339 U. S. 497, 70 Supreme Court 755).

This congressional policy is predicated on the proposition that it would be unreasonable and unfair and to a great extent destructive of the balance undertaken to be preserved with respect to the powers of the Union and powers of the states to exempt those employed by the Federal Government from nondiscriminatory state taxation. The Congress has by law taxed the confractors and employees of every State of the Union and has recognized, as have the courts, that the states should be permitted to tax those independent contractors and employees with the Federal Government where the extent and manner of the taxation does not constitute any hindrance of the sort which Congress sleems should be removed by the exercise of the constitutional power granted in Article 1, Sec. 8, Clause 18; Article 4, Sec. 3, Clause 2, of the Constitution of the United States (Metcalf & Eddy v. Mitchell, 269 U. S. 514).

This is a fair and reasonable policy and should be departed from only on the strongest evidence that Congress intended to depart from it (Smith v. Davis, 323 U.S. 111).

That Congress did not so intend is shown, further, by the prevision in Section 9 (b) of the Atomic Energy Act authorizing the Atomic Energy Commission to make payments to state and local governments in lieu of property taxes. It is difficult to reconcile this congressional concern, that state and local governments suffer no property tax loss on account of the operations of the Commission, with the construction placed on the Act by the State Court which deprives the state and local governments of many times as much tax money.

It is customary to spell out the exemption to be enjoyed by the Governmental instrumentalities, but this exemp-

tion, as determined to exist by the State Court opinion, goes far beyond the exemptions provided for other federal instrumentalities.

This is another reason why such a construction should be rejected. There is no reason to believe that Congress intended to confer on this governmental instrumentality any greater degree of exemption than that conferred on other governmental instrumentalities.

It cannot be said that on account of the cost of the nuclear energy program the Congress intended to grant a broader exemption to the Atomic Energy Commission than it has granted to other governmental agencies and corporations. For, the Congress declined to exempt war contractors, whose taxation by the States of the Union must have cost the United States Government, indirectly, many more millions of dollars than state taxation of independent contractors with the Atomic Energy Commission could ever cost. Additionally, the Oak Ridge, the Los Alamos and the Hanniford projects had already been built, without any exemption of contractors, at the time of the enactment of the Atomic Energy Act of 1946.

Reference to the legislative—history of the Atomic Energy Act reveals that two bills were prepared prior to the adoption of the present act. These were (1) May-Johnson Bill, which was House Bill, H. R. 4280, H. R. 4566, 79th Cong., 1st Session, and (2) the McMahon Bill, which was Senate Bill 1717, 79th Cong., 1st Session. Under the House Bill provision was made for the manufacture of fissionable material, (1) by the Commission itself, (2) by corporations created by the Commission, and (3) by private contractors. The exemption, contained in the House Bill, exempted the (1) Commission and (2) the corporations created by the Commission. The exemption provided in the House Bill did not exempt contractors. This House Bill was prepared by the House Committee

after consideration of the problem of manufacture and control of fissionable material. And, the fact that it did not contain, in its completed form, an exemption of contractors or any reference thereto is strong evidence that the House Committee never intended to recommend for passage a bill which would exempt independent contractors.

The Senate Committee took over many of the provisions of the May-Johnson Bill in writing the bill which finally became the law, but that Committee never inserted any express exemption of private contractors.

One of the main arguments of the intervenor and respondents, adopted by the majority opinion, is that unless the word "activities" includes contractors the Congress has enacted useless legislation, for the activities of the Atomic Energy Commission were already exempt.

This argument cannot stand when (1) the language of the exemption is considered and (2) when the congressional practice of exempting commissions and corporations by specific statute is considered.

The properties of the Commission, being federally owned properties, were exempt under the constitutionally implied exemption, yet Congress exempted the properties of the Commission; likewise, the income of the Commission was exempt, yet Congress exempted its "income." Why is it necessary then to conclude that Congress intended to include contractors by use of the word "activities" when so to do takes the word out of context and causes the exemption to apply to non-federal and non-governmental objects contrary to the other provisions of the exemption?

If it is necessary to construe the word "activities" as applying to contractors in order to avoid convicting Congress of having done a futile thing in enacting the exemption as it did, then, of course, it is necessary to construe the words "property" or "income" as applying to other objects than the Commission.

For some time it has been the practice for Congress to spell out by statute the exemption from faxation conferred on Federal commissions, Federal corporations and other governmental agencies which it created. The fact that these commissions and agencies may have already been exempt by the implication of the United States Constitution has never, before this, been considered any valid reason for extending or limiting the exemption beyond the plain requirements of the language thereof.

With respect to many of the governmental agencies, commissions and corporations created by Congress, Congress has defined the extent of the exemption in about these words: "The corporation, its property, franchise and income are hereby expressly exempted from taxation in any manner or form by any state, county or municipality or subdivision or district thereof." (See U. S. V. A., Title 16, 831-1 TVA exemption; U.S. C. A. 7, Section 1014, Farmers' Home Corporation; U. S. C. A. 12, Section 1768-Federal Gredit Unions.) It is plain that in the exemption of the "franchises" of such commission or corporation the Congress intended to exempt the activities of the governmental agency in carrying out the purposes for which it was created. It is respectfully insisted that in exempting the activities of the Atomic Energy Commission the Congress intended to exempt no more than it would have exempted if it had exempted the "franchise.", The obvious congressional intent was to exempt the Commission from either, excise or franchise taxation on account of its exercise of the privilege and obligations provided for and imposed upon it by the Atomic Energy Act.

The chancellor was of opinion that Section 9 (b) of the Atomic Energy Act does not exempt contractors from taxation for the following reasons:

. "A careful study of the language contained in this Section reveals that the Commission is directed to take into consideration the burdens its activities and the activities of its agents might cast upon the State and local governments when considering the amount of tax to be paid to those authorities in lieu of property taxes but in the last sentence quoted above, which grants exemption from taxation, it is only the Commission, its property, its activities and its income which are 'expressly exempt from taxation in any manner or form by any State county, municipality, or any subdivision thereof.' It results that the failure of the Congress to use the word 'agents' in the last sentence wherein the Commission was exempt from taxation indicates clearly that the Congress did not intend that the Commission's agents or those with whem it dealt should also be exempt from taxation.

"The Congress has upon numerous occasions expressly refused to exempt contractors engaged in work for the Government under cost-plus-fixed-fee contracts from the burdens of taxing statutes. This point was commented upon in Alabama v. King & Boozer, supra, and Also in Standard Oil Co. v. Fontenot, 4 So. (2d) 637.

"It is well established that a fixed policy of the Government will not be changed by presumption. The intention to bring about a change of an established policy must be expressed in apt words and not left to conjecture."

The minority opinion of the Supreme Court of Tennessee, that Section 9 (b) does not exempt contractors from taxation, was based in part on the following:

"I can conceive of no theory or premise upon which to base a conclusion that the appellants come within the four corners of the above statute if they are properly classified as independent contractors. It is not only conceivable, but quite consistent with reason, that agents of the Commission could rightfully claim exemption from taxation on the ground that whatever they do, or contract to do, must be adjudged as an activity of the Commission. But even where contractors claim to be agents the Congress should to avoid doubt and confusions, specifically declare an exemption. In a legal sense the appellants are not agents of the Atomic Commission."

It is anticipated that respondents will contend that the Supreme Court of Tennessee has not passed on their insistence that the sales and use transactions involved in these cases are not taxable because (1) the purchases and use of tangible personal property are by the Federal Government, and (2) title to the tangible personal property purchased and used by the contractors vests in the Government on delivery.

Petitioner insists that these issues have been passed on by the State Courts, expressly and by implication. And, being issues of fact, are not subject to further review under this petition which is directed at the federal question.

Should this Court be of opinion that further inquiry into these questions is warranted, it is respectfully submitted that these issues should be determined in favor of the petitioner.

The record establishes that purchases and use of tangible personal property are by the respondent contractor, and not the Atomic Energy Commission, and the Supreme Court of Tennessee so held (Rec. 14).

- 1. The original bill avers that the contractor makes the purchases of tangible personal property for use under the contract (Rec. 33).
 - 2. The answers admit these allegations of fact (Rec. 41).
- 3. By contract W-7401-eng-115, Exhibit 1, as amended from time to time, the Roane-Anderson Company contracted as follows:

Article & Statement of Work.

- "1. The Contractor shall manage, operate and/or maintain facilities, utilities, roads, services, properties and appurtenances situated within and/or outside the Clinton Engineer Works in the State of Tennessee, including, but not limited to, Government-owned facilities, utilities, roads, services, properties and appurtenances, as directed or authorized by the Contracting Officer; provided, however, that the work to be performed hereunder shall not be deemed to include the management, operation or maintenance of any processing plant. Work within the restricted plant area or areas may be performed upon the direction or authorization of the Contracting Officer."
- "2. By way of illustration, but not limitation, the Contractor shall perform the following services:
- "(a) The management, operation, maintenance and repair of residences, hotels, restaurants, cafeterias, dormitories, hutments, trailers, temporary housing facilities, laundries, all other buildings, structures, facilities, utilities, properties and appurtenances, whether similar or dissimilar in nature, auto pool, roads, ways, streets and sidewalks, drainage ditches, garbage disposal, sewage disposal plant and equipment, railroad tracks and appurtenant equipment, transmission lines and appurtenant equipment, water system, heating plants, plumbing and electrical equipment."
- 4. Said contract has been characterized by Carroll L. Wilson, then General Manager, Atomic Energy Commission, in a statement to the Congressional Committee on Atomic Energy of Thursday, February 17, 1949, as follows:

"The joint committee has requested that a part of this afternoon's hearing be devoted to a discussion of the Commission's contract procedures and practices. The Commission welcomes this opportunity for such a discussion. As you know, we have from time to time, in our reports to the Congress as well as in other published statements, referred to the central rule which contractors occupy in the atomic energy program. We believe that it is important for the public generally and for American business to know and to understand the policies which we are following.

"It will be helpful, I think, to begin by stating in somewhat general terms the Commission's views on the manner in which a major part of its business should be conducted.

"The Atomic Energy Act of 1946 left it to the Commission to determine, in the light of experience and prevailing circumstances in each case, whether its installations should be directly operated by the Commission or whether they should be operated by private contractors or organizations in accordance with the practice which had been initiated by the Manhattan District.

"The Commission has been of the view-and we believe this yiew is amply supported by our two years of experience since we succeeded to the responsibility of the atomic energy enterprise-that we should develop as fully as possible the method of operating through contractual relations with private organizations. We have recognized that the high relative significance of weapon production and the necessary secrecy of large parts of the atomic energy program involve the danger that only limited scientific, technical and managerial resource will be available to this most urgent new atomic enterprise. Such handicaps must be minimized and overcome if this country's rapid progress in the field of atomic energy is to be assured. Accordingly, the Commission has looked to the basic policy of contractor operation as a means of developing wide and alert participation in the program by a growing number of private organizations, both academic and industrial.

· "By pursuing a basic policy of obtaining contractorpoperators the Commission has been able to draw upon the technical and administrative talents of a broad sector of the American economy. Operation of our plants and laboratories through established independent contractors not only gives to the atomic energy program substantial benefits from accumulated experience and established facilities; it also enlists the interest and the support of industry and universities for future private development. It has been our conviction that if atomic energy is to become a generic part of the American scene it should have its roots deep in the institutions which are so productive a part of American progress in science and technology. The identities of the contractor-operators at the Commission's major facilities are, of course, well known to the members of the joint committee. At Oak Ridge the production and the laboratory facilities are operated by the Carbide & Chemicals Corp., while the Roane-Anderson Co is the principal contractor for town operations" (p. 47 of "Los Alamos Retrocession Bill and Aec Contract Policy-Hearings Before the Joint Committee on Atomic Energy Congress of the United States, Eighty-first Congress, First Session on Los Alamos Retrocession Bill and Aec Contract Policy. February 17, 21 and 24, 1949)."

- 5. Article 1, Section 3, and Article VIII, Section 3 (c), provide as follows:
 - "3. In the operation of the facilities under this contract, and in the procurement of any and all such supplies, materials and equipment necessary to the performance of the work hereunder, the Contractor shall act as agent for the United States of America, it be-

ing understood and agreed, however, that all personnel and labor shall be and remain for all purposes the employees of the Contractor, exclusively, it being understood and agreed that the duties and functions of all such persons will be performed under the sole supervision and direction of the Contractor, except as otherwise expressly provided in this contract or as otherwise mutually agreed in writing between the Contractor and the Contracting Officer."

Article VIII, Section 3 (c):

6. "(c) Reduce to writing, unless this provision is waived in writing by the Contracting Officer, every contract in excess of Two Thousand Five Hundred Dollars (\$2,500.00) made by it for services, materials, supplies, tools, machinery and equipment, or for the use thereof in connection with the work under this contract. Make all such contracts in its name as agent for the United States of America. No purchase in excess of Two Thousand Five Hundred Dollars (\$2,500.00) shall be made or placed without the prior approval of the Contracting Officer."

These provisions of the contract whereby, first, the United States Army Engineers, and, second, the Atomic Energy Commission, themselves merely agencies of the Federal Government, undertake to constitute Roane-Anderson Company an agent of the United States Government, were placed in the contract for the purpose of avoiding state taxes. On page 6 of Exhibit 36 in the Roane-Anderson Company case, the same being a copy of the negotiations between the United States Army Engineers and Roane-Anderson Company, leading up to the integration of Contract No. W-7401-eng-115, the following statement appears:

"Operation, Supervision and Maintenance, as an agent for the Government.

"(Note) The agency provision will be to the benefit of the Government as it will probably make it possible for the Government to avoid the expense of paying for certain taxes, permits, licenses and fees that might otherwise be required and secured and paid for by the contractor as a reimbursable item of cost by the Government."

Roane-Anderson Company is the agent of the United States Government only in the sense that it is the means or medium through which United States Government secures the execution of certain work which it is not prepared to execute for itself. Roane-Anderson is not an agency or instrumentality of the Federal Government.

- 8. The principal witness introduced by all respondents, Charles Vanden Bulck, Special Assistant to the Manager of Oak Ridge operations, an employee of the Atomic Energy Commission and the highest ranking employee of the Commission to testify, said:
 - "Q. So then the situation resolves itself down to this: If the contractor says he needs certain materials or supplies, he orders the materials and supplies, and they are delivered to him, and then he proceeds to use them in the manufacture of a certain designated amount of material under the contract!

A. That's right, with the exception of certain designated material which we must furnish him that he cannot obtain anywhere else. We attempt to have him buy everything he needs to operate the plant."

The respondent assigned as error, in the Supreme Court of Tennessee, the action of the chancellor in holding as above indicated. The Supreme Court of Tennessee did not sustain this assignment but held that the transactions were (1) not exempt because of implied immunity from taxation, but (2) were exempt because of the statutory exemption.

Assuming that purchases by the Atomic Energy Commission would be exempt from sales taxation, the holding of the Supreme Court of Tennessee, by necessary implication, sustains the holding of the chancellor. For this reason petitioner insists that all of these issues have been passed on by the State Courts either expressly or by necessary implication.

It is not conceded, however, that the taxation of a Tennessee vendor for the privilege of engaging in the business of making retail sales to the Atomic Energy Commission would constitute taxation of the Federal Government and be unconstitutional, even though the cost of the tax be added by law to the sales price of the article.

If the tax in question is a privilege tax resting solely on the vendor then the vendee cannot complain, nor can he maintain a suit as a taxpayer to recover back the part of the purchase price which may be equal to the tax paid by the vendor for the privilege of selling the particular article.

Section 3 of Chap. 3 of the Public Acts of 1947, the Tennessee Retailers Sales Tax Act, provides in part:

"That it is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this State, or who rents or furnishes any of the things or services taxable under this Act, or who stores for use or consumption in this State any item or article of tangible personal property as defined herein and who leases or rents such property within the State of Tennessee. For the exercise of said privilege, a tax is levied as follows:"

The Supreme Court of Tennessee in construing this provision of the Act, and the Act as a whole, has held that the tax in question is a privilege tax on a vendor for the privilege of engaging in the business of selling tangible

personal property at retail. We quote from the opinion of the Supreme Court of Tennessee in the case of Hooten v. Carson et al., supra:

"The main contention of appellant, challenging the validity of the statute, is that the tax is upon the consumer-buyer, and that this is not a privilege that may be taxed. Under Section 5 of the Act the tax is required to be collected from the consumer; that the amount must be added to the retail price of the article, etc. No retail dealer is permitted to advertise that the tax will not be collected. While the State concedes that the purchaser ultimately pays the tax, the Act expressly states that it is a privilege tax levied upon the merchant. The State can only enforce its claim for taxes solely against the merchant. All penalties for non-payment run against the retailer. It is therefore earnestly insisted that 'the tax in question is a tax upon the retail seller.'"

"We are convinced from an examination of a number of leading tax cases that this contention is correct.

There is a strong and very just reason why the Legislature made it mandatory upon the seller to collect the tax from the purchaser. This express direction is found in many of the retail sales tax statutes. The courts, in discussing this provision, have held that it is a matter of reasonable regulation of trade practices."

Hooten v. Carson, 186 Tenn. 287.

The decision in Hooten v. Carson, supra, was based in part on the opinion of the Superior Court of California in the case of Western Lithograph Co. v. State Board of Equalization, 78 P. 2d 731, in which that court held that a sales tax on the vendor of tangible personal property measured by gross retail sales, which is the basis of the Tennessee tax (Sec. 3, Chapter 3, Public Acts of Tennessee for 1947), would not violate the immunity from taxation of

a national bank which had purchased certain tangible personal property, to the price of which the tax had been added in keeping with statutory requirement.

The holding is the Hooten case is affirmed in the majority opinion in these consolidated cases (R. 7).

The cost of the tax is no greater if it is added because of a statute requirement than when added because of economic necessity. The cost of excise taxation added on this latter account is borne by the Federal Government in every purchase it makes.

This contention is sustained by the case of Brodhead v. Brothwick, 174 Fed. 2d 21, in which certiorari was denied by this Court on October 17, 1949. In that case appellant, who had sold goods to Army Post Exchanges and Naval Ships' Service Stores of the United States, Federal instrumentalities (Standard Oil Co. of California v. Johnson, 316 U. S. 481), contended, among other things, that an excise tax equal to 1½% of the gross proceeds of sales to such vendors violated the Constitution of the United States. The Ninth Circuit Court of Appeals held that such a non-discriminatory general privilege tax levied upon the vendor of materials and supplies to an Army Post Exchange or Naval Ships' Service Stores would not violate the Constitution or deprive the Government of any immunity to which it was constitutionally entitled.

Since the incidence of the Tennessee Sales Tax is on the vendor, and the addition of the tax to the sales price is required only as far as practicable [Section 5 (b), Chap. 3, Public Acts of the General Assembly of Tennessee for 1947], it is respectfully submitted that no constitutional immunity from taxation of the Federal Government would be violated even if this Court were to conclude that the sales transactions involved in these cases were between the Tennessee vendors and the Federal Government.

The contention of respondents that the sales and use transactions are not taxable because title to the tangible personal property purchased and used vests in the Government on delivery, is untenable. The same contention was made in Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, and Curry V. United States, 314 U. S. 14, 86 L. ed. 9.

The use tax is levied at the rate of 2% of the cost price on the use of tangible personal property. [Section 3; Section 3 (b) of Chap. 3, Public Acts of the General Assembly of Tennessee for 1947]. Liability for the tax does not turn on the fact of the contract of purchase of tangible personal property but upon the us "hereof. "Use" is defined in the Sales Tax Act:

"(h) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

[Sec. 2 (h), Chap. 3, Public Acts of General Assembly of Tennessee for 1947).

Application by an independent contractor of tangible personal property to the discharge of a contract is the exercise of such power over tangible personal property as is incident to ownership thereof. There is no denying the respondent contractor "used" the tangible personal property in question in this case in discharging its contract. Since the independent contractor enjoys no exemption, either express or implied, it is liable for the use tax. That ownership of the property "used" is not material is proved by the case where the independent contractor brings tangible personal property into the State, belonging to a nonresident, and applies it to the contract.

The concurring opinion filed in the Supreme Court of Tennessee finds that the respondent contractor is a purchasing agent for the Atomic Energy Commission. That the exemption of the Atomic Energy Commission from taxation by Section 9 (b) exempts the purchases need by such agents and on this account the same are not taxable.

This finding is contrary to the conclusion reached by the other four members of the court that the respondents are independent contractors, to whom the vendors look for payment (Rec. 14).

The finding is apparently based on the fact that title to the property vests in the United States Government on delivery and inspection. But this fact, though present in the cases of Alabama v. King & Boozer, supra, and Curry v. United States, supra, was held by this court not to exempt from taxation.

This concurring opinion gives consideration only to the sales tax issue presented by the consolidated cases. The issue of use tax liability cannot be resolved on the basis of the agency of the contractors in the purchase of the materials in question. This would only result in title to said goods vesting in the Government prior to use by the contractor. This condition existed in the case of Curry v. United States, supra, in spite of which it was held that the contractor was liable to pay a use tax for his use of the tangible personal property in discharging his contract.

But even the concurring opinion agrees that there would be tax liability on the basis of the contract and the record except for Section 9 (b) of the Atomic Energy Act. Apparently the Supreme Court of Tennessee, without dissent, or without distinguishing concurring opinion, would have held that the sales and use taxes could be collected from respondent except for Section 9 (b) of the Atomic Energy. Act.

One of the major questions presented by these consolidated cases is: Can a governmental instrumentality which has been granted a specific statutory exemption enlarge that exemption by the terms and conditions of the contracts of employment of independent contractors?

The Atomic Energy Act authorizes the Commission to perform all of the functions required by the Act. It exempts the Commission from taxation with respect to these things. It authorizes the Commission to employ contractors to perform certain of these functions. The Congress did not exempt the contractor. Can the 'tomic Energy Commission supplement this congressional exemption by resorting to technical artificialities of contract law!

Petitioner respectfully submits that this cannot be done. The will of Congress which must be paramount cannot be thwarted in any such manner.

This must be true with respect to an implied exemption as well as a statutory exemption since the opinions of this Court in Graves v. New York, 306 U. S. 466, 83 L. ed. 927; James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155; Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3; Curry v. U. S., 314 U. S. 14, 86 L. ed. 9; Penn. Dairies v. Milk Control Com., 318 U. S. 261, 87 L. ed. 748. Congress has been on notice since these opinions that it lies within its power to exempt from taxation both the independent contractor with the federal agency and the purchase and use of tangible personal property by such contractor. Congress has also been on notice since these opinions that the implied exemption does not apply to independent contractors and purchases and use of tangible personal property by such contractors. With this knowledge Congress has affirmatively declined to legislate on the matters thereby indicating that it is the congressional policy that nondiscriminatory sales and use taxation of independent contractors by the states is unobjectionable. Mayo v. United States, 319 U.S. 441.

Under these conditions an administrative commission cannot assume the legislative role and supplement this congressional policy by contract provisions designed to bring about a contrary result. It cannot be said that it is beyond the power of Congress, by the establishment of such a policy, to prevent an administrative agency from resorting to these means to secure an implied exemption for its contractors. In the establishment of such a policy Congress is acting under the authority of the same constitutional provisions which permit it to grant an express exemption from taxation to federal agencies when it feels that such is needed.

If, however, consideration is to be given to principles of contract law, in addition to congressional policy in determining the question of exemption or no exemption, and reference is to be made to contract provisions, then, petitioner invokes the rule that delegated immunity cannot be delegated without express authority. Penn Dairies v. Milk Control Com., 318 U. S. 261, 87 L. ed. 748; Reconstruction Finance Corp. v. J. G. Menihan Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. ed. 595, and cases cited; Colorado Nat. Bank v. Fedford, 310 U. S. 41, 53, 60 S. Ct. 800, 805, 84 L. ed. 1067, and cases cited. Under this rule and the reasoning of this Court in these cases, both the express and the implied immunity from taxation would cut off at the Atomic Energy Commission and the Commission could not confer either upon contractors with it.

In conclusion, it is respectfully submitted that this petition presents an important Federal question, the answer to which is to be made, finally, by this Honorable Court. For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX "A."

Atomic Energy Act of 1946, Section 9 (b). "Payments to State and local governments in lieu of taxes; exemption from taxation.

"(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commis sion has acquired property previously subject to State and local taxation, the Commission is authorized to o make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof. Aug. 1, 1946, c. 724, Sec. 9, 60 Stat. 765."

No. 187

FILED:

JUL 13 1951

SUPREME COURT, U. S.

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1951.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner.

VS.

CARBIDE AND CARBON CHEMICALS CORPORATION,
Respondent.

SAM K. CARSON, Commission of Finance and Taxation for the State of Tennessee,

Petitioner.

ve.

CARBON CHEMICALS CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Tennessee,
BRIEF AND ARGUMENT IN SUPPORT THEREOr.

ROY H. BEELER,
Attorney General of Tennessee,
WILLIAM F. BARRY,
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ALLISON B. HUMPHREYS, JR.,
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War Powers Act, Public Law 354, 77th Congress 9 Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Secs. 1328.23,
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56 C. J. S., Secs. 3 (2)-3 (8), Master and Servant 22

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1951.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,

Petitioner,

VS.

CARBIDE AND CARBON CHEMICALS CORPORATION,
Respondent.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,

Petitioner,

VS.

CARBON CHEMICALS CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Tennessee, BRIEF AND ARGUMENT IN SUPPORT THEREOF.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee, entered in the above-entitled consolidated cases on March 9, 1951.

OPINIONS BELOW.

These cases were consolidated for trial in the chancery court for Davidson County, Nashville, Tennessee, and but one opinion was rendered disposing of the consolidated cases (Rec. 47). This opinion is not reported. Three opinions were filed by the Supreme Court of Tennessee: a majority opinion, a concurring opinion and dissenting opinion, the latter being filed by two of the five Justices who comprise that court (Rec. 5, 23, 25). These opinions are reported in 239 S. W. (24) 27.

JURISDICTION.

The judgment of the Supreme Court of Tennessee was entered on March 9, 1951 (Rec. 1, 3). The jurisdiction of this court is invoked under 28 U.S.C., Section 1257 (3).

The federal question sought to be reviewed was raised by the original bills filed by the respondents, as complainants, in the chancery court for Davidson County at Nashville, Tennessee (Rec. 35, 95). The allegations of the two original bills, raising the federal question, are practically identical. The allegation in the original bill in the case of Carbide and Carbon Chemicals Corporation v. Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee, is as follows:

"Complainant particularly desires to call to the attention of the court the provisions of Section 9 (b) of the Atomic Energy Act of 1946, reading as follows:

"In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission in authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such

property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities and income of the Commission are hereby expressly exempted from taxation in any manner or form by any State, County, Municipality or any subdivision thereof.'

and all of its acts entered into and performed under the contract above mentioned are activities of the Atomic Energy Commission within the intendment and purpose of Section 9 (b) of the Atomic Energy Act of 1946, and that if the Tennessee Rotailer's Sales Tax is construed as being applicable to the activities or transactions which are herein questioned that Act is invalid as applied, because it is repugnant to the Atomic Energy Act of 1946, including Section 9 (b) thereof, and if construed as applicable to the activities or transactions as above mentioned is invalid as applied, because it is repugnant to the Constitution of the United States."

(Excerpt from original bill in Carbide and Carbon Chemicals Corporation case, Rec. 35.)

Petitioner's answers to the original bills denied the claimed immunity; thus issue was joined on the federal question (Rec. 42, 102).

Since these cases involve state revenue, they went, on appeal, directly to the Supreme Court of Tennessee (Section 10618, Code of Tennessee). The federal question raised by the original bills and the answers thereto was recognized by the Supreme Court of Tennessee as being determinative of the consolidated cases. This is stated in all three opinions on file (Rec. 7, 16, 22, 23, 25, 29).

In the majority opinion it is said:

"There are numerous assignments of error. whole though these assignments go to the finding or the failure of the chancellor to find facts according to the contention of the appellants. These are two contentions made by the appellants, both of which were answered contrary to their contention by the chancellor, either of which if answered in the affirmative would sustain the suits in these cases. These contentions are: (1) that the Tennessee Sales Tax Statute as applied to purchases and procurements herein is invalid and an infringement of the Federal Constitutional immunity of the means and instrumentalities employed by the United States to carry on its functions and (2) that if there is no implied Federal Constitutional immunity under the facts developed in this case, that then under the terms of Section 9 (b) of the Atomic Energy Act, creating this Federal agency, that Congress has exempted the property, income, and activities of the Commission from State or local taxation 'in any manner or form'" (Rec. 7).

After thus stating the issues, the Supreme Court of Tennessee found respondent Carbide and Carbon Chemicals Corporation to be an independent contractor with the Atomic Energy Commission. With respect to the second "contention," the majority opinion says:

"The second contention has given us far greater concern than the first and as we view it it is the question in the lawsuit" (Rec. 16).

"We are therefore of the opinion that in view of this congressional legislation the taxes in question are invalid as an unconstitutional intrusion by the State upon the performance of federal functions. The cases are therefore reversed and a judgment will be entered here for the refund of the taxes sued for. The taxes fall directly upon activities which the Commission is carrying on through its cost feinbursement contractors. The exemption in Section 9 (b) of the Act was intended to protect such activities" (Rec. 22).

It is not anticipated that respondents will make any insistence that this court does not have jurisdiction under U.S.C., Sec. 1257 (3), to grant the petition as prayed, should the court be of opinion that said petition should in the public interest, be granted.

QUESTIONS RAISED.

Chapter 3 of the Public Acts of the General Assembly for Tennessee for the year 1947 levies a general nondiscriminatory sales and use tax upon vendors selling tangible personal property at retail in Tennessee, and on those who use, store for use, distribute or consume tangible personal property in Tennessee, at the rate of 2% of the "sale price" or "cost," as defined by the act. [Chap. 3, Public Acts of 1947, Sections 2 (d), 2 (e), 3 and 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sections 1328.23, 1328.24 and 1328.25].

The sales tax provisions of said act have been construed by the Supreme Court of Tennessee, the Tennessee court of last resort, as levying a privilege tax upon the vendor for the privilege of engaging in the business of making retail sales.

[Hooten v. Carson, 186 Tenn. 282, 283, 209 S. W. (2d) 273; Chap. 3, Public Acts of 1947, Section 3; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sec. 1328.24].

The use tax feature of said act is similar to that of all ther states having a general nondiscriminatory sales tax

and complementary use tax. It levies a tax upon the privilege of using, distributing or storing tangible personal property in Tennessee, after it has been brought into Tennessee and has become a part of the mass of the property in the state. Chap. 3, Acts of 1947, Sections 3 and 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supplement, Vol. 2, Sections 1328.24 and 1328.25). Credit is allowed on the use tax of sales tax paid on such tangible personal property at the point of acquisition: (Chap. 3, Acts of 1947, Sec. 4; Williams' Tennessee Code Annotated, 1950 Cumulative Pocket Supp., Vol. 2, Sec. 1328.25).

Section 9 (b) of the Atomic Energy Act of 1946, 42 U.S.C.A. 1951 Supplement, Section 1809-(b), provides, in part, as follows:

"The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

Respondent Carbide and Carbon Chemicals Corporation is an independent contractor operating under a contract with the Atomic Energy Commission at Oak Ridge, Tennessee, using tangible personal property in discharging said contract (Rec. 9, 14, 15, 31, 32, 39).

Respondent Diamond Coal Mining Company is a Tennessee vendor who sold tangible personal property to Carbide and Carbon for use in discharging said contract (Rec. 89, 92, 101).

The question presented is whether said Section 9 (b) of the Atomic Energy Act is subject to the construction placed on it by the Supreme Court of Tennessee: That it operates to exempt from sales taxation vendors who sell tangible personal property to independent contractors with the Atomic Energy Commission; and, that said Section 9 (b) prevents the State of Tennessee from levying a use tax upon the "use" of tangible personal property by such contractors in discharging their contracts with the Atomic Energy Commission.

THE STATUTE INVOLVED.

The pertinent statutory provisions are printed in Appendix A, infra, p. 47.

STATEMENT.

History of Cases.

Four shits were commenced by contractors with the Atomic Energy Commission at Oak Ridge, Tennessee, and their suppliers, in the Chancery Court for Davidson County, at Nashville, Tennessee. These four suits were:

Carbide and Carbon Chemicals Corporation, hereinafter referred to as Carbide, a cost type contractor with the Atomic Energy Commission at Oak Ridge, Tennessee, brought the first suit, which was Rule Docket No. 65,014 in the Chancery Court of Davidson County, for the purpose of testing the "use" tax.

Roane-Anderson Company, a cost type contractor with the Atomic Energy Commission at Oak Ridge, Tennessee, brought the second suit, Rule Docket No. 65,015, in the Chancery Court of Davidson County, to test whether the "use" tax applied to it, its contract being in some regards different from that of Carbide.

Diamond Coal Mining Company, a Tennessee vendor, and Carbide brought the third suit, being Rule Docket No. 65,163 in said chancery court, to test the "sales" tax.

Wilson-Weesner-Wilkinson Company and Roane-Anderson Co. brought the fourth suit, which was Rule Docket No. 65,164 in said chancery court, to test the "sales" tax.

The first and third cases, both involving Carbide and its contract, were consolidated so far as the evidence was concerned, and one transcript was filed in the Chancery Court for Davidson County and in the Supreme Court of Tennessee for both cases. For the same reason, the second and fourth cases were consolidated and but one transcript was filed in said consolidated cases in the Chancery Court for Davidson County and in the Supreme Court of Tennessee. Review of the action of the Supreme Court of Tennessee is being sought by certiorari in these cases at this time.

After the cases were consolidated, and after the taking of depositions, leave was granted the United States to file its intervening petitions, which adopted all of the allegations and conclusions contained in the original bill and concurred in the prayers thereof (Rec. 46, 106).

While the cases were pending in the chancery court, Sam K. Carson resigned as Commissioner of Finance and Taxation of Tennessee and an order was entered substituting James Clarence Evans, who was appointed Commissioner of Finance and Taxation, as defendant, in his place. According to the practice in Tennessee, the styles of the cases were not changed but remained as they had been at the time of the filing of the original bill (Rec. 45).

The decrees of the chancery court were in favor of petitioner on all issues and respondents appealed (Rec. 86, 107).

The majority opinion of the Supreme Court of Tennessee was in favor of respondents on the issue made on the federal question, although it was in favor of the petitioner on the other issues.

Inasmuch as the decision of the federal question in favor of the claimed immunity prevents the State of Tennessee from collecting sales and use taxes which it deems the respondents liable for, the petitioner files this present petition.

The chancellor disposed of the consolidated cases with a single opinion (Rec. 47). The Supreme Court of Tennessee has done likewise (Rec. 5). Except, that one concurring and one dissenting opinion have been filed (Rec. 23, 25).

The contracts have been certified in the original form in which filed in the courf below.

The Facts.

Respondent Carbide is a private, profit type, New York corporation, domesticated in Tennessee, and is a cost-plus-fixed-fee contractor with the United States Atomic Energy Commission operating under contract W-7405-eng-26 at Oak Ridge, Tennessee (Rec. 9, 14, 15, 31, 32, 39). Respondent Diamond Coal Mining Co. is a private profit type Delaware Corporation domesticated in Tennessee, and is a commercial firm which sold coal to Carbide for use by the latter in the performance of said contract with the Atomic Energy Commission (Rec. 89, 92, 101).

Respondent Carbide entered into a contract with the United States of America on November 23, 1943, as an incident to the prosecution of World War II then in progress. The contract was designated as contract W-7405-eng-26, and was entered into pursuant to the War Powers Act, Public Law 354, 77th Congress. The contract and amendments thereto through June 30, 1948, are Exhibits 1, 2 and 19. Carbide entered upon the performance of said contract and has been engaged therein ever since (Rec. 31, 40).

The Act of Congress of August 2, 1946 (Public Law 585, 79th Congress, 42 U.S. C. A. 1801 et seq.), known as the Atomic Energy Act of 1946, duly provides for the transfer to the Atomic Energy Commission of all properties, re-

sponsibilities, duties, rights, etc., from the Government's gency, The Manhattan Engineer District of the United States Army Engineers, which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which respondent Carbide then and now maintains offices and carries on its work under said contract (Rec. 32, 40).

Pursuant to the provisions of said Act, the President of the United States duly issued Executive Order No. 9816, dated December 31, 1946, which transferred to and made the aforementioned contract, a contract between the Atomic Energy Commission and respondent, Carbide, as of midnight December 31, 1946.

As a necessary and integral part of the work under said contract, respondent Carbide purchased tangible personal property of the kind described as taxable under the Tennessee Retailer's Sales Tax Act of 1947 (Rec. 32, 41, 69).

Respondent Carbide paid Tennessee use taxes on property purchased out of the State for use under its contract (Rec. 32, 41, 69). It also paid as a part of the purchase price of tangible personal property amounts equal to the tax levied against vendors of such property for the privilege of engaging in the business of making sales thereof in Tennessee (Rec. 48, 69, 70). Hooten v. Carson, supra. On October 15, 1947, respondent Carbide paid to petitioner Sam K. Carson, then Commissioner of Finance and Taxation of Tennessee, \$2,383.58, which sum was claimed by said petitioner to be payable as the use tax on purchases by respondent Carbide from out-of-state vendors for use under its contract with the Commission for the month of September, 1947 (Rec. 32, 41, 69). Said tax was paid under protest and involuntarily and suit to recover same was begun within the time provided by law (Rec. 36, 43).

During November, 1947, the respondent Diamond Coal Mining Company in the course of business sold to respondent Carbide several thousand tons of coal for a total sales price of \$109,550.31, which price included the sum of \$2,148.03, required to be added as a part of the sales price of said coal by the Tennessee Retailer's Sales Tax Act. The sales transaction taking place in Tennessee, when respondent Diamond Coal Mining Company paid the tax provided by the Sales Tax Act on its gross sales in Tennessee, it paid \$2,148.08 as a tax for the privilege of engaging in the business of making sales of coal to respondent Carbide. This amount was paid under protest and involuntarily on December 9, 1947, and suit to recover the same was commenced within the time prescribed by law (Rec. 69, 85, 92, 96, 101, 104, 108).

All of the property purchased by respondent Carbide, asserted to be taxable, was purchased solely for use under the contract with the Commission.

By said contract W-7405-eng-26, as amended from time to time, Carbide contracted to engage in research, do experimental work, to furnish consultant services, train its personnel to enable it to operate certain government-owned plants producing specified quantities of a material then referred to as K-25 but now commonly referred to as U-235. Since July 1, 1947, respondent Carbide has operated all of the government-owned plants and facilities located at Oak Ridge, Tennessee, namely, the K-25 plant and the Y-12 plant, producing specified quantities of U-235. Since March 1, 1948, Carbide has also operated the Oak Ridge National Laboratory. All of said operations have been pursuant to the contract between the parties (Rec. 9, 141, 143, 167).

The question whether, under this contract, the sale of tangible personal property to, and the use of same by, respondent Carbide are exempt from taxation under the implication of the Constitution of the United States, was a bitterly contested issue. Both the chancellor and the Supreme Court of Tennessee have held upon a consideration of the contract and all of the evidence produced by respondents, that the sales and use transactions are not entitled to exemption from taxation on the implied immunity doctrine.

Much of the record is taken up with proof, in detail, of the manner in which articles of tangible personal property are purchased and used by respondent Carbide. This proof was placed in the record by respondents in support of their contention that the sales and use transactions are exempted from taxation by operation of the doctrine of implied constitutional immunity. As stated, the Supreme Court of Tennessee has refused to hold that these transactions are exempt from sales and use taxation under this doctrine and has held that the same are exempt from taxation solely because of Section 9 (b) of the Atomic Energy Act.

Upon this issue, the Supreme Court of Tennessee and the chancery court, the court of original jurisdiction, have concurred, both courts finding as a matter of fact, under Tennessee law, respondent contractor is an independent contractor and that on the facts and circumstances of the cases the sales transactions and use of property would be taxable except the Supreme Court of Tennessee finds Sec. 9 (b) exempts from taxation.

In consideration of these holdings by the Tennessee Courts, petitioner does not deem it necessary or proper to burden the court with a detailed recitation of the proof taken by respondent which deals with the methods by which tangible personal property was acquired by the respondent Carbide for use under its contract.

A part of the record consists of proof by respondents with respect to the manner in which the Carbide is reimbursed by the Atomic Energy Commission for expenditures made under the contract, and, proof of the methods by which advancements are made to Carbide and accounted for by it. Like the other proof just referred to, this proof was directed at the issue of immunity on account of the doctrine of implied constitutional immunity from taxation and, since this doctrine has been rejected by both the Tennessee courts as not applicable under the facts, and since the docision of the cases has been placed squarely on the construction of the federal statute involved, no detailed reference will be made to this proof.

Petitioner submits that there is no non-federal ground on which the decision of the Supreme Court of Tennessee is based, in any part, adequate to support the judgment in these consolidated cases.

SPECIFICATION OF ERRORS.

- 1. The Supreme Court of Tennessee is in error in holding that Section 9 (b) of the Atomic Energy Act of 1946, 42 U.S.C.A., 1951 Supplement, Section 1809-(b), exempts from sales taxation by Chap. 3 of the Public Acts of the General Assembly of Tennessee for the year 1947, vendors who sell tangible personal property to independent contractors with the Atomic Energy Commission.
- 2. The Supreme Court of Tennessee is in error in holding that Section 9 (b) of the Atomic Energy Act of 1946, 42 U.S. C.A., 1951 Supplement, Section 1809-(b), exempts respondent contractors from the use tax, levied by Chap. 3 of the Public Acts of the General Assembly of Tennessee for the year 1947, upon the "use" of Tangible personal property by respondent contractors in discharging their contracts with the Atomic Energy Commission.

REASONS FOR GRANTING THE WRIT.

As matters now stand with respect to the proper interpretation of Section 9 (b) we have: (1) An opinion by the chancery court holding that said Section 9 (b) does not exempt the "sale" or "use" of tangible personal property from sales and use taxation when sold to or used by a contractor with the Atomic Energy Commission; (2) a majority opinion by three of the five Justices of the Supreme Court of Tennessee, holding that said Section 9 (b) does so exempt such sale and use of tangible personal property; (3) a dissenting opinion by the two remaining members of the Supreme Court of Tennessee, who agree with the chancelor, and hold that said Section 9 (b) does not exempt as claimed by respondents.

While it is recognized that this is not necessarily the character of conflict in decisions that ordinarily furnishes the basis for the granting of the writ of certiorari, still this situation does make it appear that the proper construction of said Section 9 (b) is not easily arrived at, and that a final interpretation of the statute should be made by this Honorable Supreme Court of the United States.

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Clearly, the question presented is one of the utmost importance to many of the States of the Union. This court will take judicial notice that the Atomic Energy Commission is presently operating on a very large scale in Tennessee and Washington. At Los Alamos, New Mexico, the Atomic Energy Commission has carried on a considerable research and development program. In addition to the projects at Oak Ridge, Tennessee; Hanford, Washington, and Los Alamos, New Mexico, the Atomic Energy Commission carries on work in California, where it works through the University of California and certain laboratories in that state; New York, where the Commission has contracts

with Columbia University; Memorial Hospital and Slean Kettering Institute in New York; Wisconsin, where the Commission has contracts with the University of Wisconsin; Massachusetts, where the Commission has contracts with the Massachusetts Institute of Technology and Harvard University; New Jersey, where the Commission has contracts with Sylvania Electric Company; Illinois, where the Commission has contracts with the Illinois Institute of Technology and the Argonne National Laboratory at Chicago; the National Laboratory operated by the University of Chicago at Chicago, Illinois; Missouri, where the Commission has contracts with Washington University in St. Louis: Colorado, where the Commission has contracts with the University of Colorado; Oregon, where the Commission has contracts with the Reed College; Ohio, where the Commission has contracts with the Battelle Memorial Institute at Columbus, Ohio; Iowa, where the Commission has contracts with the Iowa State College and Ames Laboratory.

In addition to these contracts for research and development the Atomic Energy Commission has acquired large tracts of land and is preparing to erect enormous plants and spend millions of dollars in Kentucky, South Carolina and Georgia.

The foregoing references to the extent of the activities of the Atomic Energy Commission in various States of the Union, are not intended to be all inclusive, but merely to illustrate that the extent of the exemption in Section 9 (b) is of the utmost importance and should be determined at the earliest opportunity.

The writ prayed for should be granted because the differences between the Atomic Energy Commission and the State of Tennessee and other states which have arisen and which will arise on account of said Section 9 (b) will amount to millions of dollars. For example, while the

amounts sued for in these consolidated cases are not large, and, to the contrary, may be said to be more or less nominal, these are test cases, and sales and use taxes in the amount of two million dollars or more are involved (Rec. 6). In other States of the Union, where the program of development is only commencing, larger amounts of taxes can and will be involved.

In conclusion, petitioner prays that the writ of certiorari issue.

BRIEF AND ARGUMENT

In Support of Petition for Writ of Gertiorari.

DISCUSSION OF SPECIFICATIONS OF ERROR.

Both of the errors specified stem from what the petitioner believes is an incorrect construction of Section 9 (b) of the Atomic Energy Act of 1946, and the specifications will be discussed on this basis.

The Atomic Energy Act of 1946 was enacted to provide federally for the development and control of Atomic energy in order that this new source of power might be utilized, first, in the common defense and security of the United States and, second, in improving the public welfare, increasing the standard of living, strengthening free competition in private enterprise, and promoting world peace (Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 755).

In order to achieve these things the Atomic Energy Act provides for certain major programs. These are:

- "(1) A program of assisting and fostering private research and development to encourage maximum scientific progress;
- "(2) A program for the control of scientific and technical information which will permit the dissemination of such information to encourage scientific progress, and for the sharing on a reciprocal basis of information concerning the practical industrial application of atomic energy as soon as effective and enforceable safeguards against its use for destructive purposes can be devised;
- "(3) A program of federally conducted research and development to assure the Government of adequate scientific and technical accomplishment;

- "(4) A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields; and
- "(5) A program of administration which will be consistent with the foregoing policies and with international arrangements made by the United States, and which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate."

(Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 755).

The execution of these policies is assured by a provision for the appointment of an Atomic Energy Commission, a General Manager, Divisions and Directors, the appointment of a General Advisory Committee, appointment of a Military Liaison Committee, and the appointment of Army, Navy, or Air Force officers to said Military Liaison Committee. [Aug. 1, 1946, Chap. 724, Sec. 2, 60 Stat. 756, amended July 26, 1947, Chap. 343, Title II, Sec. 205 (a), 61 Stat. 501; July 3, 1948, Chap. 828, 62 Stat. 1259; Oct. 11, 1949, Chap. 673, Sections 1-3, 63 Stat. 762; Sept. 23, 1950, Chap. 1000, Sections 1, 2, 64 Stat. 979.]

Research and development are provided for by a provision in the Act requiring the Commission to foster the same (1) by contracts with and loans to private and public institutions or persons, and (2) by providing that the Commission shall engage in research and development. (Aug. 1, 1946, Chap. 724, Sec. 3, 60 Stat. 758.)

Production of fissionable material is assured by the Act which (1) makes the United States the exclusive owner of all facilities for the production of fissionable materials in other than experimental quantities; (2) provides that the Commission may (a) contract for the production of fission-

able materials in its own facilities or (b) that the Commission may produce the material itself. (Aug. 1, 1946, Chap. 724, Sec. 4, 60 Stat. 759.)

Control of fissionable material is provided for by vesting title thereto in the Commission; regulating the distribution thereof; regulating the acquisition of such materials and facilities for production; regulating the ownership and production of source materials. (Aug. 1, 1946, Chap. 724, Sec. 5, 60 Stat. 760.)

Military application of atomic energy is provided for by authorizing the Commission: (1) to engage in research and development work in the military application of Atomic energy; (2) to engage in the production of atomic bombs, atomic bomb parts, or other military weapons. All of which is to be done only to the extent directed by the President. (Aug. 1, 1946, Chap. 724, Sec. 1, 60 Stat. 763.)

Utilization of Atomic Energy is authorized in certain limited instances under certain stringent licensing regulations and requirements. (Aug. 1, 1946, Chap. 724, Sec. 7, 60 Stat. 764.)

Provision is made for the supremacy of treaty provisions over the provisions of the Atomic Energy Act in conflict therewith. (Aug. 1, 1946, Chap. 724, Sec. 8, 60 Stat. 765.)

Then comes the section dealing with the property of the Commission, in which is found Section 9 (b). By this section provision is made for the transfer to the Atomic Energy Commission of all property, interests and contracts of the United States dedicated to the production of nuclear energy or experimentation therein in the hands of other agencies. Immediately following this provision with respect to the property of the Commission and as a part of the same section follows Section 9 (b). (Aug. 1, 1946, Chap. 724, Sec. 9, 60 Stat. 765.) See Appendix A, p. 47.

The dissemination of information concerning Atomic Energy is rigidly and extensively controlled. (Aug. 4, 1946, Chap. 724, Sec. 10, 60 Stat. 766.)

Patents and inventions and production in military utilization are regulated and controlled. (Aug. 1, 1946, Chap. 724, Sec. 11, 60 Stat. 768.)

The authority, powers and duties of the Commission are defined. (Aug. 1, 1946, Chap. 724, Sec. 12, 60 Stat. 770.)

Compensation for acquisition of private property taken in the course of the execution of the Act is provided for. (Aug. 1, 1946, Chap. 724, Sec. 13, 60 Stat. 772.)

Judicial review of administrative action is recognized and provision made therefor. (Secs. 1001-1011 of Title 5, Aug. 1, 1946, Chap. 724, Sec. 14, 60 Stat. 772.)

A Joint Congressional Committee is established and reports thereto are provided for. (Aug. 1, 1946, Chap. 724, Sec. 15, 60 Stat. 772.)

Penalties, injunctions, power of subpoena and production of documents are all provided for. (Aug. 1, 1946, Chap. 724, Sec. 16, 60 Stat. 773.)

Certain terms of the Atomic Energy Act are defined. The word "activities" does not appear in this list. (Aug. 1, 1946, Chap. 724, Sec. 18, 60 Stat. 774.)

An appropriation is then made sufficient to carry out the Act. (Aug. 1, 1946, Chap. 724, Sec. 19, 60 Stat. 775.)

Your petitioner contends that Section 9 (b), when read in its proper context, and in the light of congressional policy as exemplified by the past actions of Congress, simply exempts the Atomic Energy Commission from any form of taxation when it undertakes to perform any of the

activities in which the Act authorizes it to engage; that the exemption is extended only to the Commission and does not include independent contractors with the Commission.

Before discussing in detail petitioner's reasons for this view, we should like to make reference to the grounds on which the majority opinion of the Supreme Court of Tennessee is based.

The majority opinion referred to is predicated upon thefollowing grounds: (1) The exemption should be given a broad construction. The word "activities" is a broad word (Rec. 19). (2) Congress knew that contractors were being employed by the United States Army Engineers in the development of Atomic Energy. Provision is made in the Act for production of fissionable materials by contractors. Therefore, contractors were included in the exemption created by the word "activities" (Rec. 20, 21). (3) Construed any other way the exemption is meaningless since the activities are carried on by operating contractors (Rec. 21). (4) "Presumptively Congress does not pass or enact usefess legislation. What was the purpose of immunizing 'The Commission, and the property, activities, and income of the Commission'? These are exempt from taxation under the doctrine of implied immunity" (Rec. 21). The federal courts in recent years have not been applying the doctrine of implied immunity from taxation "in various instances where the Government eventually bore the tax. It seems clear that Congress did not intend to leave this question to the courts but instead legislated on the question in such language as to cover all activities, etc., of the Government-owned instrumentalities" (Rec. 21). (5) "The word 'activity or activities' of course as applied to various things has various meanings but the ordinary accepted meaning of the term when applied to any particular thing is that it covers everything that the individual or the corporation does. It is so broad that it reaches a circumference of all the acts or doings of a corporation or an individual" (Rec. 22).

It is respectfully submitted that these points do not sustain the construction at which the State Court arrived.

It seems plain, from reading the exemption, that in speaking of activities of the Commission, Congress was not speaking of activities of the contractor, which must be an altogether different thing, if the contractor is an independent contractor and not an agent or servant.

The State Court construction is predicated on the idea that the discharge of the contract by the contractor is an activity of the Commission. It is respectfully submitted that this is not the case. This could only be true where the contractor and the Commission are one and the same in fact or in law.

Under the common law rule in Tennessee, and in other jurisdictions, activities engaged in by an independent contractor, under his contract, though for and on behalf of the other contracting party, are not to be considered the activities of the other party. Powell v. Construction Co., 88 Tenn. 692, 697; Master and Servant, 56 C. J. S., Sections 3°(2)-3 (8).

There is nothing in the Atomic Energy Act of 1946 which requires this confusion of these two separate entities. To the contrary, the Act makes it clear that Congress had in mind the Commission and, in the event the Commission saw fit to employ the same, the contractor, to carry out the act.

If, then, the Act contemplates two means by which the work is to be done, how can it be said that the exemption of one of these exempts the other? A construction which arrives at this end is not only broad, it is and we say this respectfully, a loose construction. And, while we

agree that every act designed to accomplish a constitutional end should be construed so as to bring that about, broadly if need be, we do not believe this principle requires a loose construction such as has been arrived at in this instance.

As stated, two of the primary grounds relied on by the State Court to sustain its conclusion are: (1) many contractors are employed by the Atomic Energy Commission so the exemption must apply to them. (2) A major part of the appropriation of the Atomic Energy Commission is paid the contractors, thus Congress must have intended to exempt expenditures by contractors.

It does not follow from these facts that Congress so intended.

The Act provides that the operations now carried on by contractors may be carried on by the Commission or contractors (Section 4). The exemption was written at a time when it was impossible for the Congress to know by which means the Commission would elect to carry out the program. How, then, can the fact that contractors are carrying out most of the operations and receiving the major part of the appropriations at this time have any value in determining the intent of Congress with respect to the extent of the exemption?

That there were contracts in existence at that time between contractors and the United States Army Engineers, and likely would be in the future, does not alter the situation since Congress did not require the continuation of these contracts, as indispensable to carrying out the Atomic Energy Program under the Act.

It seems far more reasonable to conclude that if Congress had intended the exemption to apply to contractors it would have said so. This is especially true in view of the care, time and attention given to the preparation of the Act.

U. S. Code, Congressional Service, 79th Congress, 2nd Session 1946, p. 1327.

Another ground of the State Court's majority opinion is as stated in (4) above, that the exemption is for the purpose of preserving intact the dectrine of constitutionally implied immunity from taxation. It is stated in the opinion that in recent years the federal courts have not been applying the doctrine and that Congress did not intend to leave this question to the courts but legislated on it in the broadest language.

The opinion assumes that there exists a doctrine of constitutionally implied immunity from taxation which exempts contractors with governmental agencies and that it was the intent of Congress to preserve this doctrine.

The doctrine of implied constitutional immunity is what this Court says it is. At the time Section 9 (b) was written, the opinions of this Court made it plain that the doctrine of constitutionally implied immunity from taxation would not exempt from nondiscriminatory excise taxation independent contractors working under contracts with a governmental agency. Alabama v./King & Boozer, 314 U. S. 1, 86 L. ed. 3; Curry v. U. S., 314 U. S. 14, 86 L. ed. 9; James 7. Dravo Contracting Co., 302 U. S. 132, 82 L. ed. 155.

If it was the intent of Congress to preserve the implied immunity doctrine as it existed at the time the exemption was written, it would necessarily follow that independent contractors are not included within the exemption.

If it had been the intention of Congress to write an exemption to the same extent as the constitutionally implied exemption, prior to the opinions of this Honorable Court in Alabama v. King & Boozer, 314 U. S. 1, 86, and Curry v.

U. S., 314 U. S. 14, 86 L. ed. 9, James v. Dravo Contracting Co., 302 U. S. 132, 82 L. ed. 155, it would have had to write into the exemption the statement that the exemption of the Commission also exempted contractors with it. Congress presumptively knew this and the fact that the exemption was not written this way is enough to show it was not intended that it be, so construed.

The dictionary definition of the word "activities" resorted to in the majority state opinion does not sustain it. The word "activities" is used in the exemption to define the extent of exemption. It does not relate to the object to whom the exemption is granted.

The exemption was obviously prepared with care. Precise language was employed to secure freedom from taxation of all the recognized objects thereof. Freedom from ad valorem, income and excise taxation of the Commission was assured by the exemption from taxation of its property, income and activities.

If the exemption was written as it was to cover the three main classifications of objects of taxation, then, the use of the word "activities" was not intended to exempt contractors.

If the classification, "activities", would include the contractor then, logically, the other classifications should include the contractor.

We submit however that Congress had no intention to exempt either the property, the income or the activities of the contractor.

Where Congress has tied together all of the objects of taxation in one bundle and has said the Commission cannot be taxed with respect to these, a construction which unties the bundle and selects one of these objects of taxation and applies it to a different, independent party, does, as we believe, violence to the congressional intent.

It is respectfully submitted that the exemption of activities of the Commission cannot be construed as exempting independent contractors with that Commission for so to do would achieve by construction a result which Congress has refused to bring about by specific legislative enactment.

The policy of Congress in this matter was recognized and commented on in Standard Oil Co. v. Fontenot, 4 So. (2d) 624, as follows:

"The plaintiff and the intervenor assert that the authority for the execution of the contracts are two Acts of the 70th Congress, namely, Public Act 703, approved July 2, 1940, 54 Stat. 712, and Public Act 611, approved June 13, 1940, 54 Stat. 350. It appears that attempts were made to amend proposed legislation to provide for a specific exemption from State taxes for contractors under a 'cost-plus-a-fixed-fee' contract, and to legislate them into the status of an agency o representing the sovereign nation. It was sought to amend Public Acts 43 (53 Stat. at L. 590-592) so as to provide that all contractors who entered into authorized contracts should be held to be agents of the United States for the purpose of such contracts. Act was passed without the proposed amendment. Prior to the passage of Public Act 588 of the 76th Congress, 54 Stat. 265, the language therein, which would have made such contractors agents of the government and would have exempted them from all taxes -federal, state and local, was stricken therefrom in the House and was concurred in by the Senate. Cong. Rec., Vol. 80, part 7, pages 7532-7535, Amd't 1205, H. B. 8438; Cong. Rec., Vol. 86, part 7, pages 7646-7648. Therefore, when the War Department entered into the contracts in question, it was with full knowledge that Congress had refused to make such contractors agents or instrumentalities of the Government and that

Congress had likewise refused to make available to such contractors a specific statutory exemption from State and local taxes (4 So. [2d] 634).

Likewise, in State of Alabama v. King Jand Boozer (1941), 314 U. S. 1, 13, 86 L. ed. 3, 8, 62 S. Ct. 43, 140 A. L. R. 615, 620, reference is made to the fact that Congress has declined to pass legislation immunizing from state taxation contractors under cost-plus-contracts for the construction of governmental projects: Reference is made in this latter case to "proposed Senate Amendment No. 120, to H. R. 8438, which became the Acts of June 11, 1940, 54 Stat. at L. 265, Chap. 313, Cong. Rec., 76th Cong., 3d Sess., Vol. 86, part 7, pp. 7518, 7519, 7527-7535, 7648."

In view of this policy of Congress to refuse to exempt contractors by the enactment of legislation which specifically defines who are contractors and what contractors are exempt, we respectfully submit that the term "activities" was not intended to exempt contractors.

The Special Congressional Committee on atomic energy to which bills for the control of atomic energy were referred reported back S. 1717, with recommendation that it pass. This recommendation was accepted and the bill did pass and become the Atomic Energy Act of 1946. The following is the only comment of the Special Congressional Committee on Section 9 of the Atomic Energy Act of 1946, including Section 9 (b):

"Section 9, Property of the Commission.

"The Commission is to ake over all resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property" (p. 1334) (U. S. C. C. S. 79th Cong., 2d Session, 1946).

It will be noted that the only reference made by the Special Congressional Committee to the question of taxes is that "the Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property." There is nothing in the whole report to indicate that the Special Congressional Committee considered the exemption of the Commission from taxation would exempt contractors with the Commission. To the contrary, the implication of the foregoing statement of the Committee is, that the Commission understood that the exemption applied solely to the Commission, its properties, and its own operation of those properties.

It is difficult to conceive that the policy of permitting state taxation of independent contractors with the Federal Government could have been departed from without any comment thereon by the Committee. The petitioner believes that if the Special Congressional Committee which adopted the bill that became the Atomic Energy Act of 1946 had intended to exempt independent contractors with this instrumentality of the Government, the report of the Special Congressional Committee would have contained some reference to this fact and some explanation. Especiaily is this true when the Special Congressional Committee was careful to state that it was the intent of the Committee to undertake to reconcile as far as possible the governmental monopoly created in the field of nuclear energy with our traditional free enterprise system (Senate Report No. 1211, April 19, 1946, U. S. C. Congressional Service, 79th Congress, 2nd Session, 1946).

The majority State Court construction cannot be sustained on the ground that nuclear energy has been declared to be a governmental monopoly and the exemption of inde-

pendent contractors with the Commission is required on this account. The making of war, the preparation therefor, and acquisition of materials for this purpose have always been a governmental monopoly. Yet, the Congress has refused to exempt independent contractors in the war effort and this Court has declined to find that the exercise of this monopolistic right so dislocates our traditional free enterprise system as to require that the operations of independent contractors engaged in producing war material be considered as governmental agencies (Powell et al. v. U. S. Cartridge Co., 339 U. S. 497, 70 Supreme Court 755).

This congressional policy is predicated on the proposition that it would be unreasonable and unfair and to a great extent destructive of the balance undertaken to be preserved with respect to the powers of the Union and powers of the states to exempt those employed by the Federal Government from nondiscriminatory state taxation. The Congress has by law taxed the contractors and employees of every State of the Union and has recognized, as have the courts, that the states should be permitted to tax those independent contractors and employees with the Federal Government where the extent and manner of the taxation does not constitute any hierdrance of the sort which Congress deems should be removed by the exercise of the constitutional power granted in Article 1, Sec. 8, Clause 18; Article 4, Sec. 3, Clause 2, of the Constitution of the United States (Metcalf & Eddy v. Mitchell, 269 U/S. 514).

This is a fair and reasonable policy and should be departed from only on the strongest evidence that Congress intended to depart from it. Smith v. Davis, 323 U. S. 111.

That Congress did not so intend is shown, further, by the provision in Section 9 (b) of the Atomic Energy Act authorizing the Atomic Energy Commission to make payments to state and local governments in lieu of property taxes. It is difficult to reconcile this congressional concern, that state and local governments suffer no property tax loss on account of the operations of the Commission, with the construction placed on the Act by the State Court, which deprives the state and local governments of many times as much tax money.

It is customary to spell out the exemption to be enjoyed by the Governmental instrumentalities, but this exemption, as determined to exist by the State Court opinion, goes far beyond the exemptions provided for other federal instrumentalities.

This is another reason why such a construction should be rejected. There is no reason to believe that Congress intended to confer on this governmental instrumentality any greater degree of exemption than that conferred on other governmental instrumentalities.

It cannot be said that on account of the cost of the nuclear energy program the Congress intended to grant a broader exemption to the Atomic Energy Commission than it has granted to other governmental agencies and corporations. For the Congress declined to exempt war contractors, whose taxation by the States of the Union must have cost the United States Government, indirectly, many more millions of dollars than state taxation of independent contractors with the Atomic Energy Commission could ever cost. Additionally, the Oak Ridge, the Los Alamos and the Hanniford projects had already been built, without any exemption of contractors, at the time of the enactment of the Atomic Energy Act of 1946.

Reference to the legislative history of the Atomic Energy Act reveals that two bills were prepared prior to the adoption of the present act. These were (1) May-Johnson Bill, which was House Bill H. R. 4280, H. R. 4566, 79th Cong., 1st Session, and (2) the McMahon Bill, which was Senate Bill 1717, 79th Cong., 1st Session. Under the House Bill provision was made for the manufacture of fissionable material (1) by the Commission uself, (2) by corporations created by the Commission, and (3) by private contractors. The exemption, contained in the House Bill, exempted the (1) Commission and (2) the corporations created by the Commission. The exemption provided in the House Bill did not exempt contractors. This House Bill was prepared by the House Committee after consideration of the problem of manufacture and control of fissionable material. And the fact that it did not contain, in its completed form, an exemption of contractors or any reference thereto is strong evidence that the House Committee never intended to recommend for passage a bill which would exempt independent contractors.

The Senate Committee took over many of the provisions of the May-Johnson Bill in writing the bill, which finally became the law, but that Committee never inserted any express exemption of private contragtors.

One of the main arguments of the intervenor and respondents, adopted by the majority opinion, is that unless the word "activities" includes contractors the Congress has enacted useless legislation, for the activities of the Atomic Energy Commission were already exempt.

This argument cannot stand when (1) the language of the exemption is considered and (2) when the congressional practice of exempting commissions and corporations by specific statute is considered.

The properties of the Commission, being federally owned properties, were exempt under the constitutionally implied exemption, yet Congress exempted the properties of the Commission; likewise, the income of the Commission was exempt, yet Congress exempted its "income." Why is it necessary then to conclude that Congress intended to include contractors by use of the word "activities" when

so to do takes the word out of context and causes the exemption to apply to non-federal and non-governmental objects contrary to the other provisions of the exemption?

If it is necessary to construe the word "activities" as applying to contractors in order to avoid convicting Congress of having done a futile thing in enacting the exemption as it did, then, of course, it is necessary to construe the words "oroperty" or "income" as applying to other objects than the Commission.

For some time it has been the practice for Congress to spell out by statute the exemption from taxation conferred on Federal Commissions, Federal corporations and other governmental agencies which it created. The fact that these commissions and agencies may have already been exempt by the implication of the United States Constitution has never, before this, been considered any valid reason for extending or limiting the exemption beyond the plain requirements of the language thereof.

With respect to many of the governmental agencies, commissions and corporations created by Congress, Congress has defined the extent of the exemption in about these words: "The corporation, its property, franchise and income are hereby expressly exempted from taxation in any manner or form by any state, county or municipality or subdivision or district thereof" (U. S. C. A., Title 16, 831-1 TVA exemption; U. S. C. A. 7, Section 1014, Farmers Home Corporation; U. S. C. A. 12, Section 1768-Federal Credit Unions). It is plain that in the exemption of the "franchises" of such commission or corporation the Congress intended to exempt the activities of the governmental agency in carrying out the purposes for which it was created. It is respectfully insisted that in exempting the activities of the Atomic Energy Commission the Congress intended to exempt no more than it would have exempted if it had exempted the "franchise." The obvious congressional intent was to exempt the Commission from either

excise or franchise taxation on account of its exercise of the privilege and obligations provided for and imposed upon it by the Atomic Energy Act.

The chancellor was of opinion that Section 9 (b) of the Atomic Energy Act does not exempt contractors from taxation for the following reasons:

"A careful study of the language contained in this Section reveals that the Commission is directed to take into consideration the burdens its activities and the activities of its agents might cast upon the State and local governments when considering the amount of tax to be paid to those authorities in lieu of property. taxes but in the last sentence quoted above, which grants exemption from taxation, it is only the Commission, its property, its activities and its income which are 'expressly exempt from taxation in any manner or form by any State, County, municipality, or any subdivision thereof.' It results that the failure of the Congress to use the word 'agents' in the last sentence wherein the Commission was exempt from taxation indicates clearly that the Congress did not intend that the Commission's agents or those with whom it dealt should also be exempt from taxation.

"The Congress has upon numerous occasions expressly refused to exempt contractors engaged in work for the Government under cost-plus-fixed-fee contracts from the burdens of taxing statutes. This point was commented upon in Alabama v. King & Boozer, supra, and also in Standard Oil Co. v. Fontenot, 4 So. (2d) 637.

"It is well established that a fixed policy of the Government will not be changed by presumption. The intention to bring about a change of an established policy must be expressed in apt words and not left to conjecture."

The minority opinion of the Supreme Court of Tennessee, that Section 9 (b) does not exempt contractors from taxation, was based in part on the following:

"I can conceive of no theory or premise upon which to base a conclusion that the appellants come within the four corners of the above statute if they are properly classified as independent contractors. It is not only conceivable, but quite consistent with reason, that agents of the Commission could rightfully claim exemption from taxation on the ground that whatever they do, or contract to do, must be adjudged as an activity of the Commission. But even where contractors claim to be agents the Congress should, to avoid doubt and confusions, specifically declare an exemption. In a legal sense the appellants are not agents of the Atomic Commission."

It is anticipated that respondents will contend that the Supreme Court of Tennessee has not passed on their insistence that the sales and use transactions involved in these cases are not taxable because (1) the purchases and use of tangible personal property are by the Federal Covernment, and (2) title to the tangible personal property purchased and used by the contractors vests in the Covernment on delivery.

Petitioner insists that these issues have been passed on by the State Courts, expressly and by implication. And, being issues of fact, are not subject to further review under this petition which is directed at the federal question.

Should this Court be of opinion that further inquiry into these questions is warranted, it is respectfully submitted that these issues should be determined in favor of the petitioner.

The record establishes that purchases and use of tangible personal property are by the respondent contractor, and not the Atomic Energy Commission, and the Supreme Court of Tennessee so held (Rec. 13).

- 1. The original bills aver that the contractor makes the purchases of tangible personal property for use under the contract (Rec. 32).
 - 2. The answers admit these allegations of fact (Rec. 41).
- and respondent Carbide provides:
 - "1. Prior to the placing of the Plant in readiness for operation in whole or in part, the Contractor shall perform all organization services in connection with the planning of, and the making of all necessary preparations for, operation of the Plant, and shall perform all other services incident to setting up an efficient and going operating force.
 - "2. When the Plant is ready for operation in whole or in part, the Contracting Officer shall so notify the Contractor in writing. The Contractor shall thereupon proceed to exert its best efforts to maintain the Plant and to operate the Plant for the production of Product K-25 for the remaining period of this contract. During such period of operation the Government shall have the right to require the Contractor to produce any amounts of Product K-25 which Contractor by exerting its best efforts is able to produce with the then existing facilities of the Plant. The Contractor shall, if and to the extent requested by the Contracting Officer, rework material produced in the Plant which does not meet specifications.
 - "4. In carrying out the work under this Title V, the Contractor is authorized to do all things necessary or convenient in and about the operation and closing down of the Plant, or any part thereof; including (but not limited to) the employment of all

persons engaged in the work hereunder (who shall be subject to the control of and shall constitute employees of the Contractor).

- "5. The Government reserves the right, upon so notifying the Contractor prior to any commitment by the latter therefor, to furnish any materials necessary for the operation of the Plant. In the operation of the Plant, The Contractor shall be free (but shall not be obligated) to use any materials of its own manufacture upon advising the Government in advance as to the price at which and the conditions upon which such materials will be supplied. In the event the Government is able to obtain material of equal quality and quantity at a lower price or on more favorable conditions from any responsible competitive source or . from its own manufacture, it may undertake to do so upon informing the Contractor within ten (10) days after being advised of the Contractor's price for such material.
- "6. The work shall be executed in the best and most workmanlike manner by qualified, careful, and efficient workers, in strict conformity with the best standard practices.
- "7. During the performance of this contract, the work shall be under the full-time resident direction of a duly authorized representative of the Contractor approved by the Contracting officer."

(Carbide contract, Exhibit 1, in Carbide and Carbon case.)

Article VIII-D, "Special Requirements," Section 3, provides:

"3. Unless this provision is waived in writing by the Contracting Officer, reduce to writing every contract in excess of Two Thousand Dollars (\$2,000.00) made by it for the purpose of the work hereunder for services (except for electric power, which contract shall be in the name of the Government, not the Contractor, materials, supplies, machinery, or equipment, or for the use thereof; insert therein a provision that such contract is assignable to the Government; make all such contracts in its own name, and not bind or purport to bind the Government or the Contracting Officer thereunder. No purchase in excess of Two Thousand Dollars (\$2,000.00) shall be made or placed without the approval of the Contracting Officer."

4. The purchase order form used by respondent Carbide contains the following language:

"This Order is placed for the benefit of, and is assignable to, the United States Government. Carbide and Carbon Chemicals Corporation's only liability hereunder shall be to pay for material or services ordered hereunder out of funds supplied by the United. States Government under Contract W-7405-eng-26, which has agreed under such contract to supply such funds. In the event of assignment to and acceptance by the Government seller agrees to look solely to the Government for payment under this Order. This Order does not bind or purport to bind the United States Government."

- 5. The principal witness introduced by all respondents, Charles Vanden Bulck, Special Assistant to the Manager of Oak Ridge operations, an employee of the Atomic Energy Commission and the highest ranking employee of the Commission to testify, said:
 - "Q. So then the situation resolved itself down to this: If the contractor says he needs certain materials or supplies, he orders the materials and supplies, and they are delivered to him, and then he proceeds to use them in the manufacture of a certain designated amount of material under the contract?

A. That's right, with the exception of certain designated material which we must furnish him that he cannot obtain anywhere else. We attempt to have him buy everything he needs to operate the plant" (Rec. 148, 149).

6. Respondent Carbelle pays the federal transportation tax on tangible personal property shipped to it on which such tax is due.

The respondent assigned as error, in the Supreme Court of Tennessee, the action of the chancellor in holding as above indicated. The Supreme Court of Tennessee did not sustain this assignment but held that the transactions were (1) not exempt because of implied immunity from taxation but (2) were exempt because of the statutory exemption.

Assuming that purchases by the Atomic Energy Commission would be exempt from sales taxation, the holding of the Supreme Court of Tennessee, by necessary implication, sustains the holding of the chancellor. For this reason petitioner insists that all of these issues have been passed on by the State Courts either expressly or by necessary implication.

It is not conceded, however, that the taxation of a Tennessee yendor for the privilege of engaging in the business of making retail sales to the Atomic Energy Commission would constitute taxation of the Federal Government and be unconstitutional, even though the cost of the tax be added by law to the sales price of the article.

If the tax in question is a privilege tax resting solely on the vendor, then the vendee cannot complain, nor can he maintain a suit as a taxpayer to recover back the part of the purchase price which may be equal to the tax paid by the vendor for the privilege of selling the particular article. Section 3 of Chap. 3 of the Public Acts of 1947, the Tennessee Retailen's Sales Tax Act, provides in part:

"That it is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this State, or who rents or furnishes any of the things or services taxable under this Act, or who stores for use or consumption in this State any item or article of tangible personal property as defined herein and who leases or rents such property within the State of Tennessee. For the exercise of said privilege a tax is levied as follows:"

The Supreme Court of Tennessee in construing this provision of the Act, and the Act as a whole, has held that the tax in question is a privilege tax on a vendor for the privilege of engaging in the business of selling tangible personal property at retail. We quote from the opinion of the Supreme Court of Tennessee in the case of Hooten v. Carson et al., supra:

validity of the statute, is that the tax is upon the consumer buyer, and that this is not a privilege that may be taxed. Under Section 5 of the Act the tax is required to be collected from the consumer; that the amount must be added to the retail price of the article, etc. No retail dealer is permitted to advertise that the tax will not be collected. While the State concedes that the purchaser ultimately pays the tax, the Act expressly states that it is a privilege tax levied upon the merchant. The State can only enforce its claim for taxes solely against the merchant. All penalties for non-payment run against the retailer. It is therefore earnestly insisted that 'the tax in question is a tax upon the retail seller.'"

"We are convinced from an examination of number of leading tax cases that this contention is correct. * * There is a strong and very just reason why the Legislature made it mandatory upon the seller to collect the tax from the purchaser. This express direction is found in many of the retail sales tax statutes. The courts, in discussing this provision, have held that it is a matter of reasonable regulation of trade practices."

- Hooten v. Carson, 186 Tenn. 287.

The decision in Hooten v. Carson, supra, was based in part on the opinion of the Superior Court of California in the case of Western Lithograph Co. v. State Board of Equalization, 78 P. 2d 731, in which that court held that a sales tax on the vendor of tangible personal property measured by gross retail sales, which is the basis of the Tennessee tax (Sec. 3, Chapter 3, Public Acts of Tennessee for 1947), would not violate the immunity from taxation of a national bank which had purchased certain tangible personal property, to the price of which the tax had been added in keeping with statutory requirements.

The holding in the Hooten case is affirmed in the majority opinion in these consolidated cases (Rec. 6).

The cost of the tax is no greater if it is added because of a statute requirement than when added because of economic necessity. The cost of excise taxation added on this latter account is borne by the Federal Government in every purchase it makes.

This contention is sustained by the case of Brodhead v. Brothwick, 174 Fed. 2d 21, in which certiorari was denied by this Court on October 17, 1949. In that case appellant, who had sold goods to Army Post Exchanges and Naval Ships' Service Stores of the United States, Federal instrumentalities (Standard Oil Co., of California v. Johnson, 316 U. S. 481), contended, among other things, that an excise tax equal to 1½% of the gross proceeds of sales to such vendors violated the Constitution of the United

States. The Ninth Circuit Court of Appeals held that such a nondiscriminatory general privilege tax levied upon the vendor of materials and supplies to an Army Post Exchange or Naval Ships' Service Stores would not violate the Constitution or deprive the Government of any immunity to which it was constitutionally entitled.

Since the incidence of the Tennessee Sales Tax is on the vendor, and the addition of the tax to the sales price is required only as far as practicable [Section 5 (b), Chap. 3, Public Acts of the General Assembly of Tennessee for 197], it is respectfully submitted that no constitutional immunity from taxation of the Federal Government would be violated even if this Court were to conclude that the sales transactions involved in these cases were between the Tennessee vendors and the Federal Government.

The contention of respondents that the sales and use transactions are not taxable because title to the tangible personal property purchased and used vests in the Government on delivery, is untenable. The same contention was made in Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, and Curry v. United States, 314 U. S. 14, 86 L. ed. 9. In those cases this Court found that even though this be the fact, it would not result in exemption from taxation of the sales and use transactions.

The use tax is levied at the rate of 2% of the cost price on the use of tangible personal property. [Section 3; Section 3 (b) of Chap. 3, Public Acts of the General Assembly of Tennessee for 1947.] Liability for the tax does not turn on the fact of the contract of purchase of tangible personal property but upon the use thereof. "Use" is defined in the Sales Tax Act:

"(h) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not

include the sale at retail of that property in the regular course of business."

-[Sec. 2. (h), Chap. 3, Public Acts of General Assembly of Tennessee for 1947.]

Application by an independent contractor of tangible personal property to the discharge of a contract is the exercise of such power over tangible personal property as is originally incident to ownership thereof. There is no denying the respondent contractor "used" the tangible personal property in question in this case in discharging its contract. Since the independent contractor enjoys no exemption, either express or implied, it is liable for the use tax. That ownership of the property "used" is not material is proved by the case where the independent contractor brings tangible personal property into the State, belonging to a nonresident, and applies it to the contract.

The concurring opinion filed in the Supreme Court of Tennessee finds that the respondent contractor is a purchasing agent for the Atomic Energy Commission. That the exemption of the Atomic Energy Commission from taxation by Section 9 (b) exempts the purchases made by such agents, and on this account the same are not taxable.

This finding is contrary to the conclusion reached by the other four members of the court that the respondents are independent contractors, to whom the vendors look for payment (R. 13).

The finding is apparently based on the fact that title to the property vests in the United States Government on delivery and inspection. But this fact, though present in the cases of Alabama v. King & Boozer, supra, and Curry v. United States, supra, was held by this court not to exempt from taxation.

This concurring opinion gives consideration only to the sales tax issue presented by the consolidated cases. The

issue of use tax liability cannot be resolved on the basis of the agency of the contractors in the purchase of the materials in question. This would only result in title to said goods vesting in the Government prior to use by the contractor. This condition existed in the case of Curry v. United States, supra, in spite of which it was held that the contractor was liable to pay a use tax for his use of the tangle personal property in discharging his contract.

But even the concurring opinion agrees that there would be tax liability on the basis of the contracts and the record except for Section 9 (b) of the Atomic Energy Act. Apparently the Supreme Court of Tennessee, without dissent or without distinguishing concurring opinions, would have held that the sales and use taxes could be collected from respondents except for Section 9 (b) of the Atomic Energy Act.

One of the major questions presented by these consolidated cases is: Can a governmental instrumentality which has been granted a specific statutory exemption, enlarge that exemption by the terms and conditions of the contracts of employment of independent contractors?

The Atomic Energy Act authorizes the Commission to perform all of the functions required by the Act. It exempts the Commission from taxation with respect to these things. It authorizes the Commission to employ contractors to perform certain of these functions. The Congress did not exempt the contractor. Can the Atomic Energy Commission supplement this congressional exemption by resorting to technical artificialities of contract law?

Petitioner respectfully submits that this cannot be done. The will of Congress which must be paramount cannot be thwarted in any such manner.

This must be true with respect to an implied exemption as well as a statutory exemption since the opinions of this

Court in Graves v. New York, 306 U. S. 466, 83 L. ed. 927; James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155; Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3; Curry v. U. S., 314 U. S. 14, 86 L. ed. 9; Penn. Dairies v. Milk Control Com., 318 U. S. 261, 87 L. ed. 748. Congress has been on notice since these opinions that it lies within its power to exempt from taxation both the independent contractor with the federal agency and the purchase and use of tangible personal property by such contractor. Congress has also been on notice since these opinions that the implied exemption does not apply to independent contractors and purchases and use of tangible personal property by such contractors. With this knowledge, Congress has affirmatively declined to legislate on the matter, thereby indicating that it is the congressional policy that nondiscriminatory sales and use taxation of independent contractors by the states is unobjectionable. Mayo v. United States, 319 U.S. 441, 87 L. ed. 1504. .

Under these conditions an administrative commission cannot assume the legislative role and supplement this congressional policy by contract provisions designed to bring about a contrary result.

It cannot be said that it is beyond the power of Congress, by the establishment of such a policy, to prevent an administrative agency from resorting to these means to secure an implied exemption for its contractors. In the establishment of such a policy Congress is acting under the authority of the same constitutional provisions which permit it to grant an express exemption from taxation to federal agencies when it feels that such is needed.

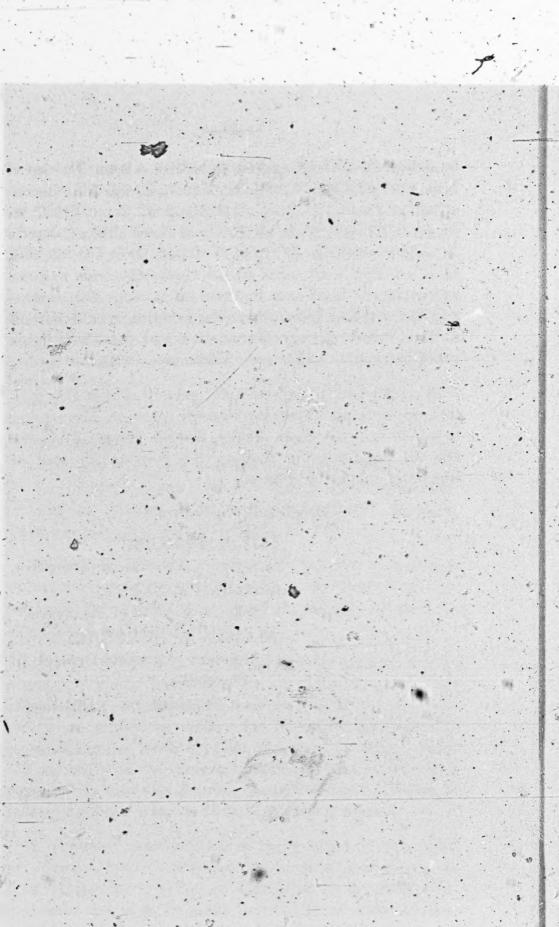
If, however, consideration is to be given to principles of contract law, in addition to congressional policy in determining the question of exemption or no exemption, and reference is to be made to contract provisions, then, petitioner invokes the rule that delegated immunity cannot be delegated without express authority. Penn. Dairies v. Milk Control Com., 318 U. S. 261, 87 L. ed. 748; Reconstruction Finance Corp. v. J. C. Meniham Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. ed. 595, and cases cited; Colorado Nat. Bank v. Bedford, 310 U. S. 41, 53, 60 S. Ct. 800, 805, 84 L. ed. 1067, and cases cited. Under this rule and the reasoning of this Court in these cases, both the express and the implied immunity from taxation would cut off at the Atomic Energy Commission and the Commission could not confer either upon contractors with it.

In conclusion, it is respectfully submitted that this petition presents an important Federal question, the answer to which is to be made, finally, by this Honorable Court. For all the foregoing reasons, the petition for writ of certiorari should be granted,

Respectfully submitted,

ROY H. BEELER,
Attorney General of Tennessee,
WILLIAM F. BARRY,
Solicitor General of Tennessee,
ALLISON B. HUMPHREYS, JR.,
Assistant Attorney General of
Tennessee,

Counsel for Petitioner.



APPENDIX "A."

Atomic Energy Act of 1946, Section 9 (b).

"Payments to State and local governments in lieu of taxes; exemption from taxation.

"(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but he Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof. Aug. 1, 1946, c. 724, Sec. 9, 60 Stat. 765."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 186. SAM K. CARSON, Commissioner of Finance and Taxation, etc., Petitioner,

ROANE-ANDERSON COMPANY, UNITED STATES, et al.

No. 187.

SAM K. CARSON, Commissioner of Finance and Taxation, etc., · Petitioner,

CARBIDE AND CARBON CHEMICALS CORP.,

UNITED STATES, et al.

On Writs of Certiorari to the Supreme Court of Tennessee.

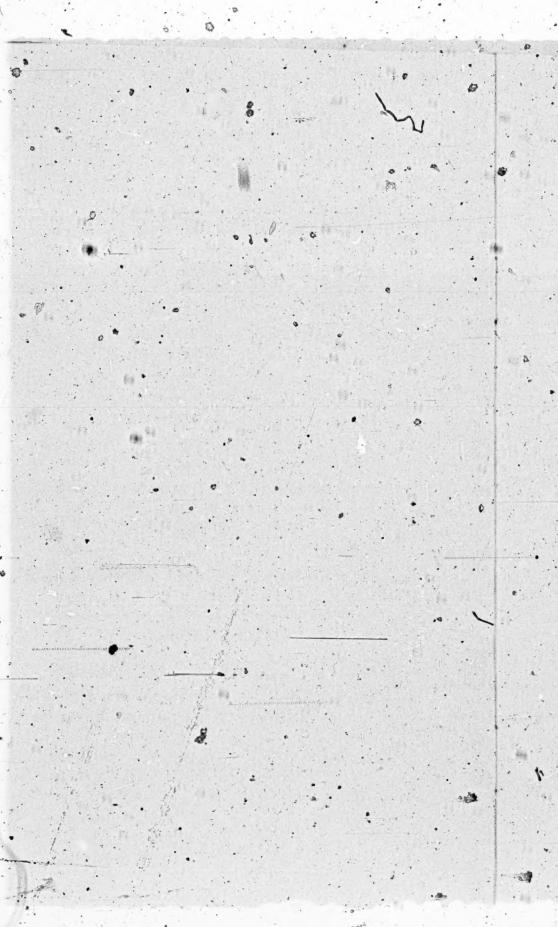
REBUTTAL MEMORANDUM

For the Petitioner Sam K. Carson, Commissioner of Finance and Taxation of Tennessee.

> ROY H. BEELER, Attorney General of Tennessee, W. F. BARRY. Solicitor General of Tennessee,

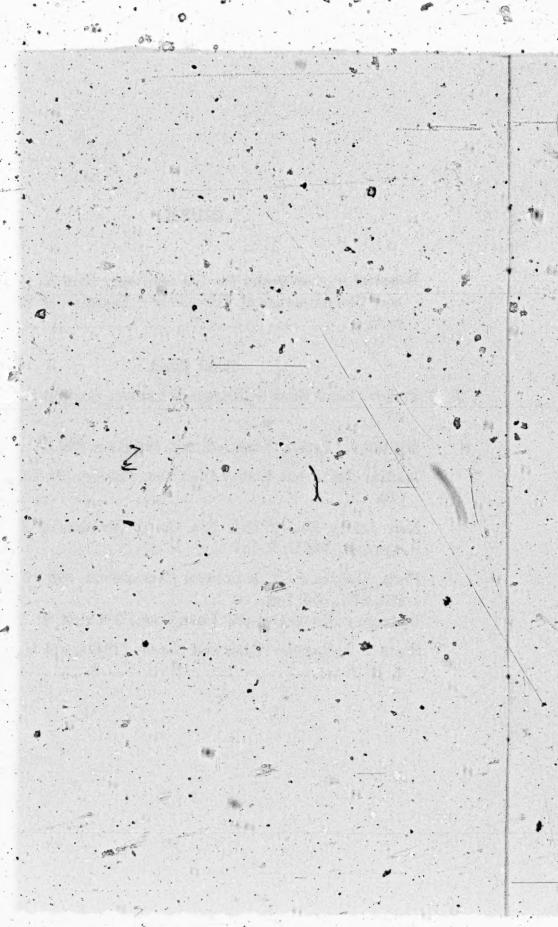
ALLISON B. HUMPHREYS, JR., Assistant Attorney General,

For Petitioners



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 186.

SAM K. CARSON, Commissioner of Finance and Taxation, etc.,
Petitioner,

ROANE-ANDERSON COMPANY, UNITED STATES, et al.

No. 187.

SAM. K. CARSON, Commissioner of Finance and Taxation, etc., Petitioner,

CARBIDE AND CARBON CHEMICALS CORP., UNITED STATES, et al.

On Writs of Certiorari to the Supreme Court of Tennessee.

REBUTTAL MEMORANDUM

For the Petitioner Sam K. Carson, Commissioner of Finance and Taxation of Tennessee:

MAY IT PLEASE THE COURT:

The reply briefs of the United States, Intervenor-Respondent, and respondents Carbide and Carbon Chemicals Corp., Diamond Coal Mining Company, Roane-Anderson, and Wilson-Weesner-Wilkerson Company, did not come to petitioner's counsel in completed form in time for

certain of the major points relied on by respondents to be replied to in the argument. On this account this rebuttal memorandum is tendered for consideration by the Court

I.

The contention of respondent contractors and their vendors, that the relationship of the contractors to the Atomic Energy Commission is such that their sales and use transactions should be exempted by Section 9 (b) of the Atomic Energy Act and the implication of the Constitution of the United States, is met and overcome by the concurrent finding of the trial court and the appellate court of Tennessee that the contractors are independent contractors. This finding of fact, applied in the light of a statement in the opinion of this court in the case of Alabama v. King and Boozer, 314 U. S. 1, 13, hereinafter quoted, deprives this contention of any force:

"But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit. See United States v. Algoma Lumber Co., 305 U. S. 415, 421, 83 L. Ed. 260, 263, 59 S. Ct. 267; United States v. Driscoll, 96 U. S. 421, 24 L. Ed. 847.

State of Alabama v. King and Boozer (1941), 314 U. S. 1, 13.

11.

The contention of the United States, intervenor-respondent, that the May-Johnson bill furnishes a dictionary for the definition of the term "activities" so as to justify and sustain the construction placed on the exemption by the Supreme Court of Tennessee and the respondents, is met

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and overcome by the fact that under the May-Johnson bill the contractor employed by the Commission created by that bill would not have been exempt from state taxation either expressly or by implication.

The May-Johnson bill provided for the production of fissionable material by (1) the Commission; (2) corporations created by the Commission; (3) contractors. The bill contained a section of "definitions." Commissions and corporations created by it were defined as "governmental instrumentalities." Contractors were simply defined as "agents" The exemption provision in the May-- Johnson bill exempted only the Commission and the corporations creeded by it. It did not exempt contractors. The failure to define the private contractor as a governmental instrumentality, in which event transactions by it would have been exempt, coupled with the failure to include the contractor in the exemption provision, makes it plain that it was not intended that the contractor be exempted from taxation under the May-Johnson bill. It is submitted that these facts far outweigh the fact of the definition of the private contractor as an agent. It is not at all uncommon for the contractor to be referred to as the agent of the government, in spite of which it has never been considered that such contractors are exempt from state taxation.

"Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. Reconstruction Finance Corp. v. J. G. Meniham Corp., 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595, and cases cited; Colorado Nat. Bank v. Bedford, 310 U. S. 41, 53, 60 S. Ct. 800, 805, 84 L. Ed. 1067, and cases cited;

Penn. Dairies v. Milk Control Commission, 318 U. S. 261, 87 L. Ed. 748.

III.

The contention of the United States, intervenor-respondent, that the holding of the Tennessee Supreme Court in Hooten v. Carson, Commissioner, 186 Tenn. 282, that the Tennessee sales tax is a tax on the vendor, has been qualified by the opinion of that court in Madison Suburban Utility District v. Carson, 191 Tenn. 300, is not well taken. The "use" tax was the only tax before the Tennessee Supreme Court in the Madison Suburban Utility District case. The sales tax was not before the court. Any observations of the Tennessee court with respect to the effect of the exemption granted the Utility District on the sales tax, was pure dictum. The holding of the Tennessee Supreme Court in the Madison Suburban Utility District case was that the statutory exemption granted the Utility District was sufficient to exempt it from the use tax which is levied on the vendee user, the Utility District. That the Utility District case is considered by the Tennessee Supreme Court as relating solely to the use tax is shown by the fact that it is cited in the opinion of the Supreme Court of Tennessee in these present cases solely in reference to the use tax, while the Hooten case is cited in reference to the sales tax (R. in No. 186, at 7; R. in No. 187; at 6).

IV.

The contention of respondents, that the exemption provision is entitled to a broad or loose construction on account of the opinions of this court in Pittman, v. Home Owners' Loan Corp., 308 U. S. 21; Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95, and New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U. S. 665, is not well taken. These cases are not in point. They involved direct state taxation of acts by Federal instrumentalities (Pittman v. Home Owners' Loan Corp., supra; Federal Land Bank v. Bismarck Lumber Co., supra) or

state taxation of the Federal instrumentality itself. (New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, supra.) If the contractor is not a Federal instrumentality, and he cannot be under the King and Boozer case and the Penn. Dairies case; if the act of the contractor is not the act of the Commission, as held by the Supreme Court of Tennessee in its finding that the contractor is an independent contractor, the pending cases are plainly and readily distinguishable from the cases relied on by respondents as requiring a broad construction.

The petitioner contends that in as much as exemptions from taxation are not ordinarily loosely or broadly construed, and, in as much as the exemption so construed would be in derogation of the Eserved sovereignty of the State of Tennessee, that the court should not adopt a broad or loose approach so as to sustain the construction given the Act by the State Court and the respondents, but should require that the Act provide an exemption in plain and express terms without resorting to implication or construc-If the reserved sovereignty of the States of the Union can be set aside at the will of Congress, the least that can be required is that the Act that does this be plain, clear and certain with respect to its terms and conditions. No one can say, except this Court, what the limits of this exemption are. If the provision exempts sales and use transactions on the part of Tennessee vendors and independent contractors, then, of course, it also exempts the property and income of such contractors. Additionally, it exempts such contractors from all forms of state excise, franchise, and privilege taxation. Likewise, the contractor is relieved of making tax contributions to the State agencies interested in State employment welfare and other related matters. If "activities" is to be construed as contended for by respondents it has the effect of exempting the salaries and wages of the employees of the Commission from any form of state taxation. For, most assuredly, any

such broad construction of "activities" would include the employment of personnel and the payment of compensation to such personnel. Such a construction would, in all likelihood, result in the exemption of any form of state taxation of the compensation paid by contractors to their employees. There can be little difference between the purchase of labor and the purchase of tangible personal property.

It is respectfully submitted that Congress never intended to exempt to the extent claimed by the respondents and that the holding of the Supreme Court of Tennessee to that effect should be reversed.

Respectfully submitted,

ROY H. BEELER,

Attorney General of Tennessee,

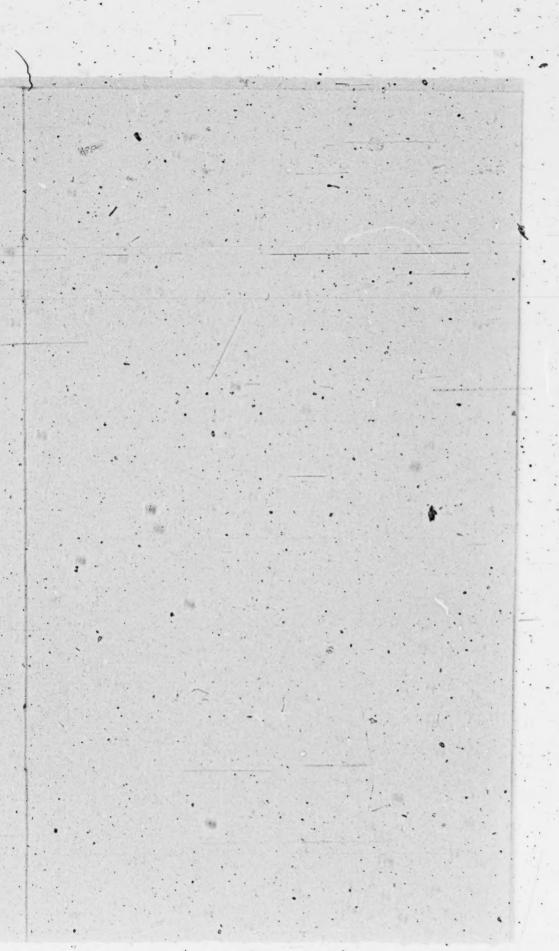
W. F. BARRY,

Solicitor General of Tennessee,

ALLISON B. HUMPHREYS, JR.,

Assistant Attorney General,

For Petitioner.





Nos. 186, 187

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In the Supreme Court of the United States

OCTOBER TERM, 19519

SAM K! CARSON, COMMISSIONER OF FINANCE AND TAXATION, PETITIONER

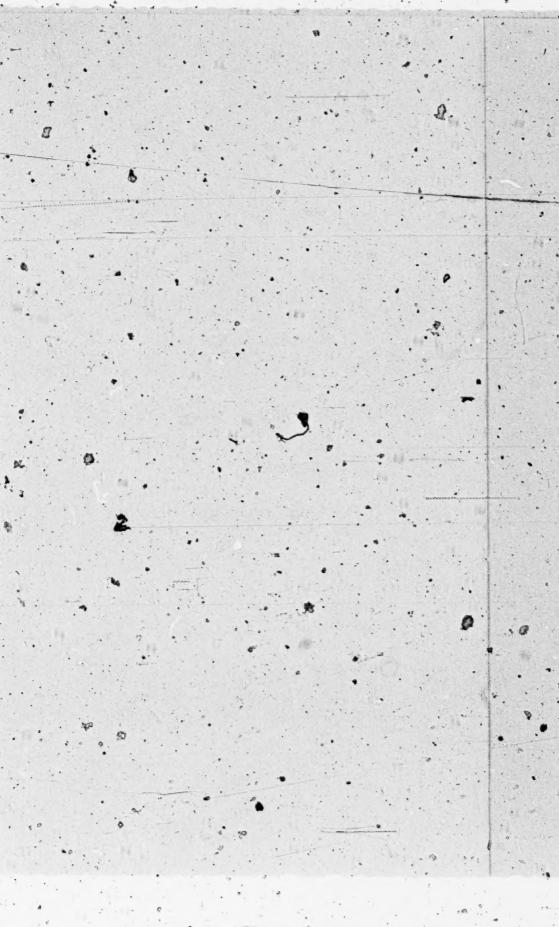
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SAM K. CARSON, COMMISSIONER OF FUNANCE AND TAXATION, PETITIONER

CARRIDE AND CARDON CHEMICAL CORPORATION, ETG., DIAMOND COME MINING COMPANY, ET AL.

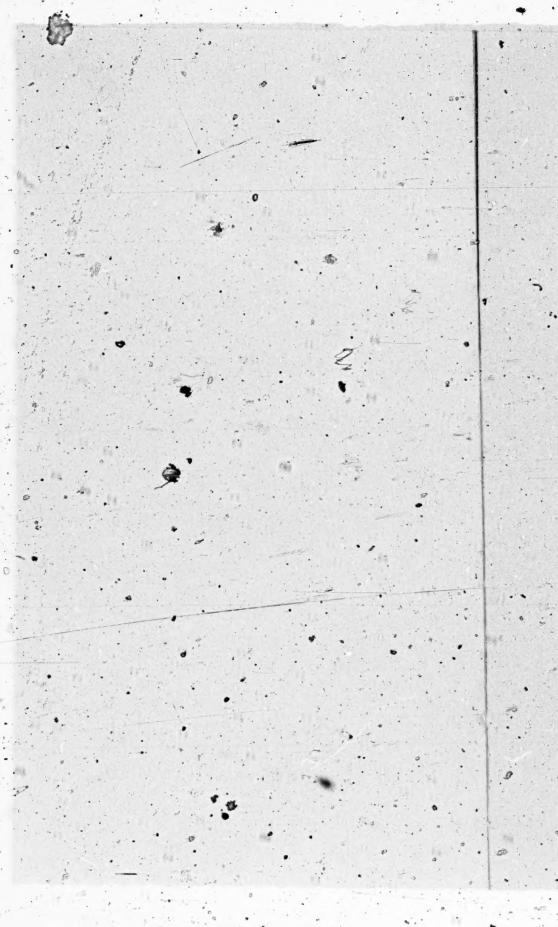
ON PETITIONS FAR WRITE OF CENTIORABL TO THE SUPREME COURT OF TENNESSEE

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 186

0

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION, PETITIONER

ROANE-ANDERSON COMPANY, ET AL.

No. 187

SAM K. CARRON, COMMISSIONER OF FINANCE AND TAXATION, PETITIONER

v.

CARBIDE AND CARBON CHEMICAL CORPORATION, ETC., DIAMOND COAL MINING COMPANY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

MEMORANDUM FOR THE RESPONDENTS AND FOR THE UNITED STATES, INTERVENOR

The question presented in these cases is essentially that of the construction to be given to Section 9 (b) of the Atomic Energy Act of 1946, c. 724,

60 Stat. 755 (42 U.S.C. 1946 ed., Sec. 1809) which in pertinent part provides:

The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or by any subdivision thereof.

Specifically the question presented is whether the purchase and use of materials and supplies by cost-type contractors of the Atomic Energy Commission in the performance of their contracts are part of the "activities" * * * of the Commission" within the intendment of Section 9 (b) and therefore exempt from taxation by any state, county or subdivision thereof "in any manner or form."

The Court below, after first concluding upon the authority of Alabama v. King & Boozer, 314 U. S. 1, that the contractors were independent contractors (No. 186, R. 1647), construed Section 9 (b) as exempting the purchases and uses of materials by those contractors from Tennessee sales and use taxes.

In reaching that conclusion the court below, rejecting petitioner's contention that Section 9 (b) was to be narrowly construed (No. 186, R. 19-24), adopted a broad construction of the provision and placed its decisions upon that construction (No. 186, R. 23-24).

The broad interpretation of Section 9 (b) by the Tennessee court is in accord with the principles laid down by this Court in cases involving similar exemption provisions of prior federal statutes. Pittman ... Home Owners' Loan Corp., 308 U. S. 357; Reconstruction Finance Corp. v. Beaver County, 328 U. S. 204; Federal Land Bank, v. Bismarck Co., 314 U. S. 95; Maricopa County v. Valley Bank, 318 U. S. 357.

Undoubtedly, the question presented by the petitions for writs of certiorari is one of very substantial monetary and legal importance both to the states and to the Atomic Energy Commission. The question of the interpretation to be given to Section 9 (b) has arisen not only in Tennessee but in Washington, New Mexico, Illinois, California, Indiana, Georgia, South Carolina, and Kentucky as well. Moreover, the question is a potential one in any state in which the Atomic Energy Commission is now, or in the future may be, engaged in the conduct of its affairs.

However, the decisions below, the first to consider the question, would seem to be correct and hence there is no impelling reason for review at this time. If the basic question here involved is to be decided by this Court, it would appear to be more desirable that the question be presented more broadly than it is in these cases, involving only sales and use taxes. In this connection, it is to be noted that the Superior Court of Thurston

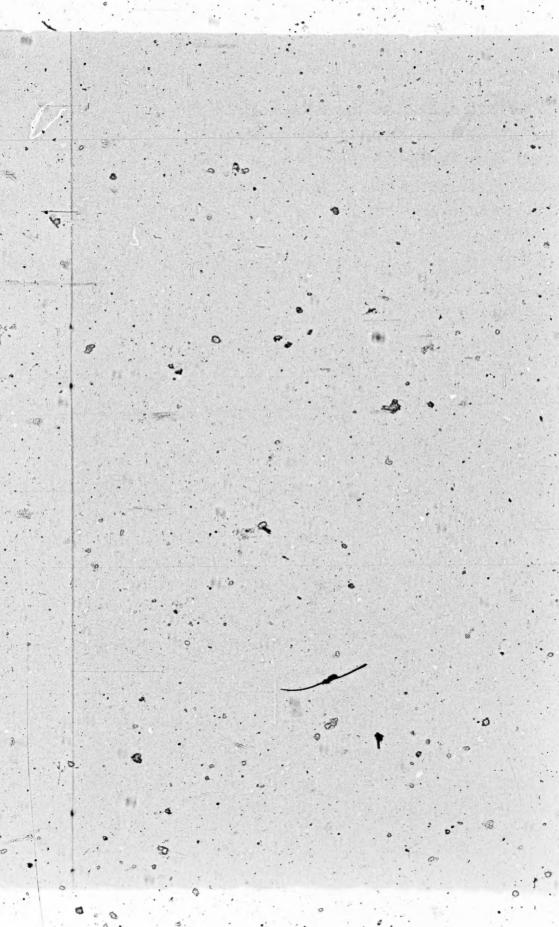
County, Washington, held, on September 20, 1951, in the case of General Electric Co. v. State of Washington, that Section 9 (b) precluded the application of Washington business and occupation taxes to the reimbursements made to a cost-type contractor with the Atomic Energy Commission for its expenditures for both labor and materials. The Department of Justice has been advised by the State of Washington that this decision will be immediately appealed by the State to the Supreme Court of Washington, and that it is hoped that the case can be brought to this Court, if necessary, during this term.

It is respectfully submitted (a) that consideration of the petitions should be delayed until the Supreme Court of Washington has passed upon the similar questions pending before it, with leave to the parties and the intervenor to file further memoranda in light of the Washington decision, or (b) if the Court is not disposed to do this, that the petitions for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

S. FRANK FOWDER,
Attorney for Respondents.

OCTOBER 1951.



SUPREME COURT, U.S. Nos. 186, 187

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IN THE

Supreme Court of the United States

October Term, 1951

Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner,

ROANE-ANDERSON COMPANY, ET AL., Respondents.

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner,

CARBIDE AND CARBON CHEMICALS CORPORATION, ET AL., Respondents.

MEMORANDUM ON BEHALF OF RESPONDENTS, CARBIDE AND CARBON CHEMICALS CORPORA-TION, DIAMOND COAL MINING COMPANY, ROANE-ANDERSON COMPANY, WILSON-WEESNER-WILKINSON COMPANY

> S. Frank Fowler, Counsel for Respondents.



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IN THE

Supreme Court of the United States

October Term, 1951

Nos. 186, 187

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner,

ROANE-ANDERSON COMPANY, ET AL., Respondents.

Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner,

CARBIDE AND CARBON CHEMICALS CORPORATION, ET AL.,

Respondents.

MEMORANDUM ON BEHALF OF RESPONDENTS

STATEMENT OF THE CASES

The Respondents herein filed four original bills in the Chancery Court (Part I) of Davidson County, Tennessee,

against the Petitioner herein, to recover certain moneys paid to the Petitioner and claimed by him to be due as taxes under the Tennessee Retailers' Sales Tax Act.

The first case was filed by Carbide & Carbon Chemicals Corporation (hereinafter referred to as Carbide), a cost-type contractor with the Atomic Energy Commission for the purpose of testing the use tax (that is, the tax invoked where Carbide buys from an out-of-state vendor) and was brought to recover use taxes theretofore paid to Petitioner. This was Number 65014 in the court below, and is No. 187 before this Court.

The second case was brought by Roane-Anderson Company (hereinafter referred to as Roane-Anderson), a cost-type contractor with the Atomic Energy Commission of the United States, likewise to test the use tax. This was Number 65015 in the court below, and is No. 186 before this Court.

The third case was brought by Diamond Coal Mining Company and Carbide, to test the sales tax, being Number 65163 in the court below, and is No. 187 before this Court.

The last case was brought by Wilson-Weesner-Wilkinson Company and Roane-Anderson, likewise to test the sales tax, and was Number 65164 in the court below, and it No. 186 before this Court.

Hereafter references to the Transcript of Record in Case No. 187 are indicated as "Carb. R." followed by the page number. Those to the Transcript of Record in No. 186 are indicated as "R-A R." followed by the page number.

STATEMENT OF FACTS

While the petitions filed by the Petitioner in these cases set forth a brief summary of the facts, the Respondents present the following statement of facts to the Court. To the extent this statement of facts may be at variance with the findings by the Chancellor below (Carb. R. 67-84; R-A. R. 68-84), or with any finding of the Supreme Court of Tennessee, it is Respondents' contention that such findings

of both are actually conclusions of law which are subject to review by this Court. Where facts are established by admissions in defendant's answers below no citations to the records are given.

The Respondents Roane-Anderson and Carbide are cost-plus-fixed-fee contractors of the United States Atomic Energy Commission operating under Centracts W-7401-Eng-115 and W-7405-Eng-26 at Oak Ridge, Tennessee. The Respondents Wilson-Weesner-Wilkinson Company and Diamond Coal Mining Company are commercial firms which sold items of personal property to the Respondents Roane-Anderson and Carbide for use by the latter in the performance of their contracts with the Atomic Energy Commission.

The Respondent Carbide on November 23, 1943, entered into a contract with the United States of America, as an incident to the prosecution of World War II then in progress, and designated by the parties thereto as Contract W-7405-Eng 26. That contract and the amendments thereto through August 29, 1949, are Exhibits 1, 2, 19, and 27-36, inclusive, herein. The scope of work contemplated under said contract was important at that time and remains important at this time in relation to matters of extremely grave concern to the national welfare, security and defense. The Respondent Carbide promptic entered upon the performance of said contract, has been engaged therein ever since, and is so engaged at the present time.

The Respondent Roane-Anderson Company, a subsidiary of the Turner Construction Company organized specifically for this purpose, on February 14, 1944, entered into a

^{*}Since the filing of this suit the Carbide and Carbon Chemicals, Corporation was merged with the Union Carbide and Carbon Corporation, and the latter has been substituted as the contracting party with the Government ab initio with respect to both the rights and obligations of the former under Contract W-7405-Eng-26. The contract operation is now carried on by the Carbide and Carbon Chemicals Company, a Division of Union Carbide and Carbon Corporation.

contract with the United States of America, as an incident to the prosecution of World War II then in progress, and designated by the parties thereto as Contract W-7401-Eng-115. That contract, and amendments thereto through June 23, 1949, are Exhibits 1, 2, 27, 30-35, inclusive, herein. The scope of the work contemplated under said contract was important at that time and remains important at this time, in relation to matters of extremely grave concern to the national welfare, security and defense. The Respondent Roane-Anderson promptly entered upon performance of said contract, and has been engaged therein ever since, and is so engaged at the present time.*

The Act of Congress of August 1, 1946 (Public Law 585—79th Congress, 42 USCA 1801, et seq.), known as the Atomic Energy Act of 1946, provides for the transfer of all properties, responsibilities, duties, rights, etc., from the Government's agency which had exercised jurisdiction over and supervision of the operations in the area within Roane and Anderson Counties, Tennessee, formerly known as the Clinton Engineer Works and now referred to as Oak Ridge, in which the Respondents Roane-Anderson and Carbide then and now maintain their offices and carry on their work under said contracts.

The Governmental agency through which said work had been carried on until the transfer to the Atomic Energy Commission was known as the Manhattan Engineer District of the United States Army Corps of Engineers. Acting pursuant to and in accordance with the provisions of said Act, the President of the United States issued Executive Order No. 9816, dated December 31, 1946, which

^{*}The Roane-Anderson Company has given notice of termination under its contract, and by agreement between this Respondent and the Atomic Energy Commission the Roane-Anderson Company contract is being terminated, effective November 30, 1951. Counsel for the Respondents has been advised by representatives of the Commission that the work heretofore carried on by Roane-Anderson will be performed under a similar type contract with a group of Oak Ridge citizens, incorporated as Management Services, Inc.

transferred to and made the aforementioned contracts, contracts between the Atomic Energy Commission, an agency of the United States of America, and the Respondents Carbide and Roane-Anderson as of midnight December 31, 1946.

As a necessary and integral part of the work under, and in the course of action required by said contracts, the Respondents Carbide and Roane-Anderson have purchased property of the kind described as being taxable under the Tennessee Retailer's Sales Tax Act of 1947, and will continue to purchase such property in the performance of their contracts.

The Respondent Carbide has paid. Tenessee sales and use taxes on the purchases of property for use under its contract with the Commission and described as being taxable under said statute.

The Respondent Roane-Anderson has paid Tennessee sales and use taxes on the purchases of property for use under its contract with the Commission and described as being taxable under said statute.

All of the procurements of property by Carbide and Roane-Anderson asserted to be taxable by the Petitioner undersaid Tennessee sales tax statute were purchased solely for use under their contracts with the Commission, and were obtained under, and handled through, the same procedures and arrangements as the purchases by each of said Respondents described in the testimony and the exhibits attached. (Carb. R. 174-218, R-A R. 176-220). The Carbide procedures and forms are shown by Exhibits 3 through 12, and 13 through 18. The Roane-Anderson procedures and forms are shown by Exhibits 4 through 17, and 18 through 26.

As the legality of the tax collections here under consideration involve the legal status of Carbide and Roane-Anderson under their contracts with the United States Government, those contracts, as well as the Respondents' operations, will be summarized

Carbide & Carbon Chemicals Corporation:

By Contract W-7405-Eng-26, as amended from time to time, Carbide contracted with the Government to carry on certain research and experimental work, to provide consultant services, to train personnel to operate certain Government-owned plants, and to operate for the Government said Government-owned plants then being constructed for the production of U-235, or otherwise related to the Atomic Energy program of the Government in Oak Ridge, Tennessee. This was a cost-plus a fixed-fee contract.

As of July 1, 1947, and continuously from that date, Carbide has operated for the Commission in Oak Ridge all of the Government-owned plants and facilities for the production of fissionable materials; namely the K-25 plant, and the Y-12 plant. (Carb. R. 167, 126-127). Since March 1, 1948, Carbide has also operated the Oak Ridge National Laboratory. (Carb. R. 126). The scope of the work carried on in these plants, while not subject to disclosure in detail for security reasons, may be stated generally as encompassing the production of fissionable material for use in military, weapons, and the production of radioactive materials for use in peace time applications of atomic energy in the fields of biology and medicine, for industrial uses, and for many types of research (Carb. R. 119, 136, 141-143, 167, Carbide contract). Carbide also carries on in the plants an extensive program of research and development in various phases of the atomic energy field as directed by the Commission (Carb. R. 142-143, 167, Carbide contract).

The contract under which these operations are carried on may be described as a management contract whereby Carbide provides the personnel and certain technical experience, and the Government provides the facilities, and the money, and formulates the policies and programs to be carried out. (Carb. R. 141-144, 146-152, 173, 191, 195-205, 214-218, 220-227, and Carbide contract). The actual plant operations are carried on under the control of employees of

Carbide subject to and in accordance with policies and instructions of the Government (Exhibit 1, Article V-A, D, E, F, G, I, Carb. R. 228-234). Carbide owns none of the real or personal property making up the plants or used in the operation of the plants. (Carb. R. 133-136, 174, 194, 241-242).

The contract provides that in the operation of the plants, Carbide shall do all things necessary or convenient "in and about the operation and closing down" of the plants (Exhibit 1, Article V-A, p. 4). Although the basic facilities are provided by the Government, and the supply of uranium and certain other materials are furnished from time to time by the Government, operation of these plants includes the securing or purchasing of labor, tools, machinery, equipment, supplies, and services needed in connection with the plants.

By this contract the Government agreed to pay Carbide its cost of the work plus a fixed-fee based on the estimated cost at the time the contract was entered into (Exhibit 1, The fixed-fee is subject to increase Article V, and VI). or decrease owing to such changes as the Government might require in the contract, but is not subject to any adjustment in case the actual costs vary from the estimated cost. The contract expressly provides that all the work is to be at the expense of the Government; that the Government shall hold Carbide harmless against any loss or damage occurring unless due to wilful misconduct or bad faith of the Company's officers (Exhibit 1, Article VIII-A, Supplement 19); and that Carbide is under no obligation to use any of its own funds in the performance of the contract (Exhibit 1, Article VI-D). Carbide has not used any of its own funds in the performance of this contract (Carb. R. 173), and all of the costs thereof have been paid from monies advanced by the Government for that purpose (Exhibit 1, Article VI-C), or from revenues received by Carbide for the Government's account and used in reducing the cost of the work (Exhibit 1, Article V, Section 5, and Article IX).

Title to purchased materials for which Carbide is entitled to reimbursement vest in the Government directly from the vendors, the Government and Carbide having consistently dispensed with the formalities originally mentioned in the contract (Exhibit 1, Article VIII-4, Section 4, Supplement 8), the provisions for which were really created to cover Government procurements handled in ways different from those at Oak Ridge.

Article VIII-D, Section 3, of Exhibit 1 provides that Carbide shall make all purchases in its own name and not bind or purport to bind the Government, and that all purchases in excess of \$2,000.00 will be approved by the Government

before being made.

The contract further provides that salaries and expenses of Carbide employees to be reimbursable under the contract, must be approved by the Government, and certain key personnel may not be employed without prior approval of the Government (Exhibit 1, Article VI-A, Exhibit 19, and Carb. R. 218-227). The Government may require Carbide to dismiss from the contract work any employee whom the Government deems to be incompetent, careless, insubordinate, or whose continued employment is considered inimical to the public interest (Exhibit 1, Article VIII-D). All labor disputes, or threatened disputes, must be brought to the attention of the Government (Exhibit 1, Article VIII-N). All patentable discoveries made by Carbide or its employees in the performance of the contract must be reported to the Government, which will determine whether same will be patented, and the disposition of title to and any rights under any patent which may result (Exhibit 1, Article VIII-R). All technical data, notes, drawings, designs, and specifications prepared by Carbide in the performance of the contract become the property of the Government, and will be delivered over to the Government whenever requested (Exhibit 1, Article VIII-Y). The contract provides for the payment of employee benefits for death or injury due to certain hazards peculiar to the atomic energy program, when approved by the Government (Exhibit 1. Article VIII-BB, Supplement 22).

The raw material for use in these Government-owned plants is procured and furnished by the Government, and its use carefully and systematically controlled and accounted for under the direction and supervision of the Government (Carb. R. 157-158, 228-235, and Exhibit 20). Certain other types of property, utilities, and services are furnished to the plants by the Government without charge to the contractor (Carb. R. 228-235).

METHOD OF REIMBURSING COSTS. As provided in Article VI-C, Exhibit 1, the Government has advanced to Carbide from time to time sufficient monies with which to pay all of the costs incurred by Carbide in the performance of the contract. (Carb. R. 173, 188). The payment of Carbide's fee has not been made as a part of or from these advances, but is paid directly to Carbide by the Government. The advance of money originally made by the Government was placed in a special bank account upon which Carbide could draw to meet its costs. In order that a specified balance would always be on hand in this account, a procedure was followed whereby Carbide would pay for the materials, etc., going into the operations from this account, and in turn submit a voucher on the Government showing how much had been spent. The Government then reimbursed Carbide by a like amount, which was in turn deposited to the Special bank account. (Carb. R. 188). For a description of the reimbursement procedure reference is made to the Exhibits filed with the depositions in this case for the purchase of a Braun pulverizer from the Fisher Scientific Company. (Carb. R. 173-188). Carbide prepared and placed the purchase order with the vendor (Exhibit 7). The vendor hipped the item ordered and invoiced Carbide (Exhibit 8). On receipt the equipment was checked and a receiving report prepared by an employee of Carbide and approved by a representative of the Government (Exhibit 9). Carbide then paid the vendor by check drawn on the Hamilton National Bank of Knoxville against Carbide's "contract account" (Exhibit 11), and submitted a voucher

against the Government (Exhibit 12). When the amount shown on the woucher was paid to Carbide, that sum was then deposited in the "contract account" and used for subsequent purchases.

THE SPECIAL BANK ACCOUNT. The terms and conditions of the advances authorized by the contract are covered in Article VI-C. Exhibits 1 and 31. In brief this article states that the Government may advance to Carbide sums (originally not to exceed 50% of the estimated contract work), without interest, for use as a revolving fund in carrying on the contract work. Until all such advances are liquidated, all sums received by Carbide, together with all funds received as reimbursements for contract costs and other revenues received under the contract are to be deposited in a member bank of the Federal Reserve System, or in an insured bank within the meaning of 12 USCA 264, and be maintained separate and distinct from Carbide's own The contract requires that such funds will be so designated to indicate clearly toothe bank their special character and purpose, and restricts the use of the funds to carrying out the contract between Carbide and the Government.

This provision of the contract originally provided that the balances on hand in the special accounts should secure the repayment of the advances, and that the Government would have a lien upon such balances to secure the repayment, which lien would be superior to any lien of the bank or any other person. By Modification No. 24 to the contract (Exhibit 31) Article VI-C of the contract was amended, effective October 1, 1948, in connection with the establishment of an integrated cost accounting system for use by the Commission's cost-type contractors. In general the changes to Article VI-C affirmed the intent of the parties that Carbide was not required to use its own funds in carrying out the contract work, expressly stated that title to the funds in the special accounts remained in the Government until expended, and provided that the amounts of Government

ment funds to be advanced for the contract work would be mutually agreed upon.

Checks may be drawn on these special accounts by the Contractor, but upon notice by the Government to the bank, the contract provides that Carbide shall have no right to make further withdrawals. The Bank is required to act upon such notice and shall be under no liability to any party to the contract for any action taken in accordance with such notice.

On completion or termination of the contract for other than the fault of the contractor, the unliquidated balance of such advances shall be deducted from any payments otherwise due Carbide, and the excess of the unliquidated balance is to be returned to the Government. If the contract is terminated because of the fault of Carbide, the entire unliquidated balance of the advance must be returned to the Government without set-off.

Originally the contract provided that at any time during the performance of the contract, if the Government determined the amount in advance was in excess of Carbide's current needs under the contract, it could direct Carbide to return the determined excess to the Government. By Modification 24 the procedure by which a determination may be made that an excess of funds needed to carry on the work actually existed requires mutual agreement between the parties, or, in the event of disagreement, a finding under the disputes provision of the contract.

By Modification No. 24 (Exhibit 32) Article VI-C was amended to provide, effective October 1, 1948, as follows:

"1. It is the intent of the parties that the Contractor shall not be required to utilize its own funds in making expenditures reimbursable under this contract. Accordingly, the Government shall advance to the Contractor, from time to time (generally monthly, but in any event at such times, more or less frequently than once each month, as in the opinion of the Commission the Contractor's need therefor develops), such Gov-

ernment funds (hereinafter referred to as "advances") as the parties mutually agree upon in writing as adequate to enable the Contractor to continue to make reimbursable expenditures under this contract in furtherance of its performance thereof; any failure so to agree shall be deemed to be within the purview, and shall be resolved in accordance with the provisions, of Article VIII-F. It is understood that such advances are not loans to the Contractor and will not require interest payments by the Contractor, and that the Contractor will acquire no right, title or interest in or to such advances other than the right to make expenditures therefrom for the purposes authorized in, and within the intent of, this contract.

- "2. Until all such advances are liquidated, all funds received as reimbursement shall, together with all such advances, be deposited in a special bank account or accounts (hereinafter referred to as "special accounts") at a member bank or banks of the Federal Reserve System or any "insured" bank within the meaning of the Act creating the Federal Deposit Insurance Corporation (Act of August 23, 1935, 49 Stat. 684) as amended (12 U.S.C. 264), separate from the Contractor's general or other funds; special accounts shall be so designated as to indicate clearly to the bank their special character and purpose; and balances in special accounts shall be used by the Contractor exclusively for the purpose of making reimbursable expenditures under this contract (including such amounts, considered reasonable by the Commission, as are expended by the Contractor in furtherance of the pro-∛isions of this Article).
- "3. In the event either party is of the opinion, at any time or times, and notifies the other party in writing, that the then balance of such advances is in excess of the Contractor's need, the amount of alleged excess

shall be promptly returned or credited to the Government in such manner as the Commission directs; however, if such opinion is not concurred in by the other party, the matter shall be deemed to be within the purview, and shall be resolved in accordance with the provisions, of Article VIII-F, and such portion of the amount of alleged excess as is involved in the dispute shall not be so returned or credited pending the outcome of the dispute.

- "4. All funds advanced and all funds deposited in special accounts shall remain the property of the Government until expended or returned. The Government's title to such funds shall be superior to any claim or lien of the bank or any other party upon special accounts irrespective of the basis of such latter lien, provided, however, that the bank shall be under no liability to any party hereto for the withdrawal of any funds from special accounts through checks properly indorsed and signed by the Contractor, except that after the receipt by the bank of written directions from the United States Atomic Energy Commission the bank shall act thereon and be under no liability to any party hereto for any actions taken in accordance with such written directions. Any written directions received by the bank in due course, upon United States Atomic Energy Commission stationery, and purportedly signed by or at the direction of said Commission, shall, insofar as the rights, duties and liabilities of the bank are concerned, be conclusively deemed to have been properly issued and filed with the bank by said Commission.
- "5. If, upon expiration of this contract, or upon its termination for other than the fault of the Contractor, such advances have not been fully liquidated, the unliquidated balance thereof shall be deducted from any payments otherwise due the Contractor, and if the sum or sums due the Contractor are insufficient to cover

such balance, the excess shall be returned by the Contractor forthwith after demand and final audit by the Government of all accounts hereunder; provided, however, that in the event of such termination of the contract for other than the fault of the Contractor, such deduction shall not be made prior to final audit unless (and only to the extent that) the Commission determines that such action is reasonably required in order to secure the return to the Government of such unliquidated amounts of the advance monies. In the event of termination of this contract because of the fault of the Contractor, the Contractor shall return to the Government, upon demand, without set-off of any sums alleged to be due the Contractor, the unliquidated balance of such advances.

- "6. The Contractor shall at all reasonable times afford the Commission proper facilities for the inspection and audit of special accounts, and the Contractor's papers and data relevant thereto, and the Commission shall have the right (to the extent of the Contractor's rights), during business hours, to inspect and make copies of any entries in the books and records of the pertinent bank or banks, pertaining to special accounts.
- "7. Subject to the prior written approval of the Commission, the Contractor may make advances of Government funds out of special accounts to subcontractors and materialmen, upon such terms and conditions as the Commission approves in writing."

PROCUREMENT OF PROPERTY. In operating these wholly-owned Government plants Carbide purchases a large volume of personal property, both in Tennessee and outside the state, for use in the plants or for the activities it carries on for the Commission. The requests for procurements, such as those involved in these cases and shown as Exhibits 3 through 12, and 13 through 18, originate with

employees of the Company directly in charge of specific phases of operations. (Carb. R. 175). Orders for requested materials or supplies are placed by Carbide through a standard purchase order form (Exhibit 7), and when for more than an amount specified in the contract, must be approved by a representative of the Government. The contract originally required approval for purchases over \$2,000 (Exhibit 1, Article VIII-D), but now requires this approval only for purchases in excess of \$100,000. (Exhibit 31, p. 6). When property purchased is received at the warehouse, employees of Carbide inspect and accept the merchandise. (Carb. R. 209-218). Until October 1948 the Government also made spot checks of materials being received-in which event a Government inspection sheet was prepared, and the Government and Carbide inspectors countersigned the two reports. (Carb. R. 186, 211, 216). Under present procedures no spot check inspections are made by the Government, although the Government does inspect and approve Carbide's methods and organization for receiving and checking incoming materials. (Carb. R. 151-157, 186, 210, 216). On acceptance of the materials by Carbide, an appropriate marking is placed, burned or stamped on the material (if of such a nature that it can be marked) to indicate that it is the property of the Government. The symbol used for this purpose by Carbide is the letters "USC & CCC", followed by a number and a prefix letter to show the plant for which the property is intended. (Carb. R. 135, 185-186, 197). The symbol and number placed on the property is assigned at the time the purchase order is prepared, and is affixed on the property at the time of inspection in the warehouse. (Carb. R. 205-206, 211). This marking of property was a requirement of the Army prior to the taking over of these plants by the Commission, and was continued thereafter by the Commission for the purpose of identifying the Government's property (Carb. R. 134). Carbide prepares and maintains stock record cards (Exhibit 10) on property so received, and such cards are the records of the Government and the sole property record maintained of materials purchased and used for the contract work. (Carb. R. 179-180, 201-202). Carbide carries no insurance on the property it purchases, either while in transit or after receipt. (Carb. R. 187).

The Carbide contract, prior to Modification No. 24, pro-

vided:

"Title to all materials, tools, machinery, equipment and supplies for which the Contractor shall be entitled to reimbursement under Article VI-A shall vest in the Government at such point or points as the Contracting Officer may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time." (Exhibit 1, Article VIII-A, par. 4, Supp. 8).

This provision of the Carbide contract, as stated with regard to the Roane-Anderson contract, is standard form language used in many types of Government contracts, and its primary use was in situations where the property being procured had to pass through several contractors before delivery to the Government. (Carb. R. 132-135, 147). In the performance of this contract no point has been designated by the Government as the point at which title would pass (Carb. R. 134-135, 185), nor have any written acceptances of such property been made (Carb. R. 192), other than the counter signature by a Government representative on the receiving reports prepared by Carbide (Carb. R. 148-149). As in the case of Roane-Anderson all such receiving reports were countersigned though the property referred to therein was not manually inspected.

Since Modification No. 24, this provision of the Carbide

contract has read:

"Title to all property (including, but not limited to, materials, tools, machinery, apparatus, equipment, supplies, and products) acquired by the Contractor under this contract and for which it is entitled to reimbursement under this contract shall pass directly from the vendor or supplier to the Government at the point of delivery thereof or at such other point or points as the Commission may designate in writing; provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the Commission; and provided, further, that, upon such final inspection, the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Contractor shall be responsible for the removal of the rejected property within a reasonable time."

Article VIII-D, par. 3 of the Carbide contract requires that the Company place contracts for the purchase of materials in its own name, and not bind, or purport to bind, the Government. Carbide has included in all of its purchase orders a statement to this effect (Exhibit 7). Carbide's own obligation with respect to such procurement is stated on these purchase orders as follows:

"Carbide & Carbon Chemicals Corporation's only liability hereunder shall be to pay for materials or services ordered hereunder out of funds supplied by the United States Government under Contract W-7405-Eng-26, which has agreed under such contract to supply such funds."

Upon receipt and acceptance of property purchased, Carbide's receiving warehouse delivers the property to the operating division or office of Carbide initiating the original request, or stockpiles the property for general use. Purchases of such items as coal are delivered directly to the coalyard, and thereafter used or consumed in the operation of the plants. At no time after passing through the receiving warehouse is such property inspected by the

Government. (Carb. R. 186). As stated in the testimony, it was the intent of the Government and Carbide that title to all such property should pass directly from the vendor to the Government, and in fact it was the practice of the Government and Carbide to treat title to such property as having passed directly from the yendor to the Government. (Carb. R. 133-136, 174, 193, 197-198).

All of Carbide's procurements were originally shipped on or converted to Government Bills of Lading (Carb. R. 150, 236-241). While this practice has been discontinued, no changes have been made in the Carbide procurement forms and procedures followed in purchasing materials for these Government-owned plants. The purchases of coal by Carbide from the Diamond Coal Mining Company, shown as Exhibit 14, were converted from a commercial Bill of Lading to a Government Bill of Lading, and the cost of transportation paid by the Government to the carrier (Exhibit 22, 23, 24, 25).

Roane-Anderson:

By Contract W-7401-Eng-115, as amended from time to time, Roane-Anderson contracted to "manage, operate, and for maintain facilities, utilities, roads, services, properties and appurtenances situated within and/or outside the Clinton Engineer Works in the State of Tennessee, including, but not limited to, Government-owned facilities, utilities, roads, services, properties, and appurtenances, as directed or authorized" by the Government. (Exhibit 1, Article 1). This contract was a cost-plus-a-fixed-fee contract.

The town of Oak Ridge was built for the sole purpose of housing workers necessary for the construction and operation of the Government's plants at Oak Ridge (R-A R. 118, 122). The Government acquired by purchase or comdemnation all of the land, some 59,000 acres, on which the city and the plants were built, although it did not take exclusive jurisdiction thereof. It is stipulated by the parties that all the buildings on the land comprising the area known as the

Clinton Engineer Works, including the town of Oak Ridge, were built for the Government and belong to the Government. (R-A R. 244).

Roane-Anderson was engaged by the Government primarily as the "town management" contractor and does no direct operations in connection with the Atomic Energy . Commission plants in Oak Ridge. The Company has operated for the Government the town bus system, cafeterias, dormitories, and the hospital, all of which were Governmentowned. The Company presently manages the Governmentowned housing facilities in Oak Ridge, maintains the roads and streets, utility systems (electricity, water, sewerage disposal), and obtains concessionaires to operate businesses or commercial enterprises in Oak Ridge, using Governmentowned facilities and on Government-owned property. (R-A R. 123-125, 166-1684172). Under its contract Roane-Anderson provides these services, executes contracts, housing licenses and concessionaire agreements as agent for the Government (Exhibit 1, Article 1, Paragraph 3, R-A R. 168, 169, 172, 173, 183, 190, 202). Roane-Anderson owns none of the real or personal property which it operates or manages, or uses in the performance of its contract (R-A R. 168, 170).

Roane-Anderson also performs certain maintenance and repair services on other Government-owned buildings and properties, and carries on its payroll a number of employees designated as "mandatory employees", who perform municipal type services under the direction of employees of the Government; for example, policemen, and firemen. (R-A R. 124, 173-174). The supplies, materials and equipment needed for such organizations of "mandatory employees" are procured by Roane-Anderson and paid for in the same manner as all other purchases by the Company. (R-A R. 176, 184, 191-192).

All of the Company's activities under its contract are under the direct supervision of Government representatives (Exhibit 1, Article XVIII), and the manner and extent of

the various services and operations of the Company are subject to the direction and authorization of such representative (Exhibit 1, Article 1, Section 1, et seq., R-A R. 140, 150-154, 166, 172, 223-227). The contract expressly provides that in the operation of the facilities under this contract, and in the procurement of any and all supplies, materials and equipment necessary to the performance of the work thereunder, the Company shall act as agent for the United States of America (Exhibit 1, Article 1, Paragraph 3, and Article VIII, Paragraph 3C). The Company has so acted at all times in purchasing the items of personal property asserted by the defendant to be taxable under the Tennessee sales tax law (R-A R. 168, 169, 183).

The Government agreed to pay Roane-Anderson its cost of the work plus a fixed-fee based on the estimated cost at the time the contract was entered into. By the terms of the contract the Government can increase or decrease the "management, operation, and maintenance services" called for in the contract without there being an adjustment in the fee payable to the Company (Exhibit 1, Article IV).

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The contract provides that, subject to the approval of the Government, the Company shall prescribe the rates and charges to be paid by persons benefiting from or using Government property managed by the Company, that the Company will collect the revenues arising therefrom, and use such revenues to reduce the cost of the work under the contract (Exhibit 1, Article II, and Article V, Section V).

The contract also authorizes the Company to sell/Government-owned property in its possession or transferred to it for disposal, and the proceeds of such sales paid in as the Contracting Officer shall direct. (Exhibit 1, Article 1, Section 2j).

Title to property furnished by the Government for use by the Company remains in the Government (Exhibit 1, Article V, Section 2b), and title to all materials purchased by Roane-Anderson, and for which it is entitled to reimbursement, vests in the Government directly from the sellers, the Government and Roane-Anderson having consistently dispensed with the formalities originally mentioned in the contract (Exhibit 1, Article IX), the provisions for which were really created to cover Government procurements handled in ways different from those at Oak Ridge. By Modification No. 20 (Exhibit 32) Article IX was amended to provide, effective October 1, 1948, as follows:

"Title to all property (including, but not limited to, materials, tools, machinery, apparatus, equipment, supplies and products) acquired or manufactured by the Contractor under this contract and for which the Contractor is entitled to reimbursement hereunder shall pass directly from the vendor or supplier to the Government at the point of delivery thereof of at such other point or points as the Commission may designate in writing; provided, that the right of final inspection and acceptance or rejection of said property at such place or places as it may designate in writing is reserved to the Commission; provided, further, that upon such final inspection the Contractor shall be given written notice of acceptance or rejection as the case may be. In the event of rejection the Contractor shall be responsible for removal of the rejected property at Government expense within a reasonable time. 3?

The contract requires that all property, title to which is vested in the Government, shall be suitably marked to indicate that such items are the property of the Government, and requires the Company to turn over to the Government at the expiration or termination of the contract, or upon demand of the Contracting Officer, all such "equipment, machinery, tools and unused materials and supplies to the place designated by the Contracting Officer." (Exhibit 1, Article V, Section 2b) The contract further provides that all legal matters arising in connection with the work shall be referred to the Government; that the Government will provide the necessary office space for the Company, and that it is the intent of the parties that the work is to be performed at the expense of the Government, and the Company shall not be

liable for any loss, damage, claim, or expense of any kind arising out of the performance of the contract, unless such expense results from the wilful misconduct of the Company's officers (Exhibit 1, Article XXVIII).

The salaries and expenses of the Company employees, to be reimbursed, must be approved by the Government (Exhibit 27, Exhibit 1, Article XXX, and Article V, Section 1); certain key personnel for the Company's organization cannot be employed without prior approval of the Government (Exhibit 1, Article V, Section 1e); the Government may require the Company to dismiss employees deemed by the Government to be incompetent, careless, or insubordinate or whose continued employment is deemed to be immical to the public interest; all labor disputes, or threatened disputes, must be brought to the attention of the Government; and all contracts between the Company and unions representing its employees must be submitted to the Government for approval (Exhibit 1, Article XX) (R-A R. 221-230).

METHOD OF REIMBURSING COST: As of May 31, 1947, Roane-Anderson had advanced for the purposes of this contract some \$100,000.00, and Roane-Anderson at that time had on hand some \$200,000.00 of Government money for use in connection with the contract work. (R-A R. 170, 171). The money advanced by Roane-Anderson was obtained from Company sources, and the Government money on hand represented revenues collected by Roane-Anderson on the Government's account and reimbursements made to Roane-Anderson by the Government. (R-A R. 173, 174). This money was on deposit in the Hamilton National Bank of Knoxville, Tennessee, in the name of Roane-Anderson. From this account the Company paid the salaries of its employees, the cost of materials procured for the work, and all other expenses under the contract. (R-A R. 171, 199-202). The fee payments by the Government to Roane-Anderson were not made from this money. (R-A R. 201, Exhibit I, Article II, Exhibit 30, Article VI).

Since the Government did not originally advance a sum of money with which to carry on the contract work, it was

necessary for the Company to establish a working fund for this purpose. (R-A R. 200). In addition, however, all of theo revenues collected by Roane-Anderson for the Government from rentals of Government property, sales of Government property, and for other charges and income from the use of Government facilities were deposited by Roane-Anderson in the Hamilton National Bank, and thereafter used in paying obligations incurred under the contract. As the amount of revenue and income of these sources increased, Roane-Anderson was able to reduce the amount of its own funds necessary to pay for the contract work and since July 1, 1948 the Company has had none of its own money employed in its operations under the contract (R-A R. 170). This result, which was intended by the parties, was brought about by Roane-Anderson paying the contract costs out of the revenues received, and in turn billing the Government for the full amount of the expenditures which, when reimbursed to Roane-Anderson by the Government, were deposited to Roane-Anderson's account in the Hamilton National Bank. (R-A R. 200-201). At the present time Roane-Anderson operates entirely out of revenues it collects for the Govern-0 ment and advances of meney by the Government to Roane-Anderson (R-A R. 171, 201).

For a description of the reimbursement procedure reference is made to the exhibits filed with the depositions in this case for the purchase of a radio transmitter-receiver by Roane-Anderson from the Motorola Company.

PROCUREMENT OF PROPERTY: In the conduct of its work for the Commission, Roane-Anderson purchases annually a large volume of personal property, both in Tennessee and outside of the State, for use under its contract (R-A-R. 170, 176). All procurements of such property by Roane-Anderson prior to December 1, 1947 were made on purchase order forms such as shown by Exhibits 6 and 7, as agent for the Government (R-A-R. 184). From and after said December 1, 1947, such purchases have been made as agent for the Government on a purchase order form such as shown by Exhibit 8, and subject to the conditions stated

on the reverse thereof (R-A R. 184). The contract with the Government expressly provides that Roane-Anderson shall act as agent for the Government when procuring such property (Exhibit 1, Article I, par. 3, and Article VIII, par. 3(c)), and that any purchase orders over a specified amount must be forwarded to the Government for approval prior to placing with the vendor. Originally the contract required this approval for all purchases in excess of \$2500 (Exhibit 1, Article VIII, par. 3(c)), but since Modification No. 20 requires prior Government approval only for purchases in excess of \$10,000. (Exhibit 32, Article VIII, par. 3(c)).

Vendors are directed on the purchase orders to ship the property to the Atomic Energy Commission, Oak Ridge, Tennessee, care of Roane-Anderson Company-(R-A. R. 181, Exhibits 5 and 6). When property so purchased is received at the warehouse in Oak Ridge, employees of Roane-Anderson inspect and accept the purchased items (R-A R. 203). Until October 1948 the Government also made spot checks of materials being received by Roane-Anderson (R-A R. 206). On these spot checks the Government inspector would prepare an inspection sheet (Exhibit 13) in addition to the tally-in sheet prepared by Roane-Anderson Company (Exhibit 12). (R-A R. 205, 210, 218). Under the present procedures the Government does not inspect or make spot cheeks of incoming purchases, although it does review and approve Roane-Anderson's procedures and organization for inspection and accepting incoming items (R-A R. 206, 212, 219). On acceptance of the property by Roane-Anderson an appropriate marking is affixed to the property (if of such a nature that it can be marked) to indicate that it is property of the Government. The symbol used for this purpose by Roane-Anderson consists of the letters "USRA". (R-A R. 133, 204). Following receipt of the vendor's invoice (Exhibit 11), and preparation of a receiving, inspection, and acceptance report (Exhibit 14), which is countersigned by a representative of

the Government, Roane-Anderson pays the invoice (Exhibit 15) and submits a reimbursement voucher to the Government for the amount of its expenditures (Exhibit 17).

All of such property purchased by Roane-Anderson is used by the Company in the operation of the facilities carried on for the Government, or in the repair or alteration of Government-owned property, or by some of the "mandatory employees" on Roane-Anderson's payroll in the performance of municipal type functions (R-A R. 166, 167, 170).

The contract between Roane-Anderson and the Government, prior to Modification No. 20, provided (Exhibit 1, Article IX):

"Title to all materials, tools, machinery, equipment, and supplies which the contractor purchases in accordance with Article I of this contract, and for which the contractor shall be entitled to reimbursement under Article V, shall vest in the Government at such point or points as the Contracting Officer may designate in writing, provided that the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment, and supplies at such place or places as he may designate in writing is reserved to the Contracting Officer; provided further, that upon final inspection the contractor shall be given written notice of acceptance or rejection as the case may be."

This provision of the contract is standard form language used in many types of Government contracts, and reserves to the Contracting Officer full control over when and where the Government would take title to property being procused for it. This language is primarily intended to cover situations where the Government was procuring property which had to pass through several contractors before delivery to the Government (R-A R. 131-132). Under this contract no point was designated by the Contracting Officer as the point at which title would pass (R-A R. 133, 187, 207, 209). Until the revision of the Roane-Anderson purchase order form (Exhibits 8-9) all orders carried the

statement that "this order is for the account of the United States Government and becomes property of the Government at the time it is shipped." Although this statement was removed from the purchase order form with the approval of the Contracting Officer, the effect thereof was merely to permit passage of title at the f.o.b. point speci-

fied in the purchase order. (R-A R. 180-182, 186).

It was and remains the intent of the Government and Roane-Anderson that the title to property purchased by Roane-Anderson vested in the Government at the moment title passed from the vendor, and all property purchased by Roane-Anderson has been so treated (R-A R. 133-135, 169, 172, 181, 183, 185-186). No written notices of acceptance by the Government of the materials purchased by Roane-Anderson were prepared and forwarded to Roane-Anderson, other than the inspection reports made on a spot check basis and the signing, by a representative of the Government, of the inspection and receiving reports prepared by Roane-Anderson (Exhibit 14, R-A R. 147-149; 209-214).

Procurements by Roane-Anderson originally were shipped on or converted to Government Bills of Lading (R-A°R. 238-239). While this practice has been discontinued, no changes have been made in the procurement forms and procedure followed by Roane-Anderson in the procurement of supplies and equipment for use in the contract work.

The contracts of Carbide and Roane-Anderson involved in these cases have been amended from time to time since their inception. At the time depositions were taken in these cases all of the contract modifications then executed were filed as exhibits. Between that time and the hearing of the cases before the Special Chancellor additional modifications to these contracts were executed by the Respondents and the Government. By stipulation between the parties (R-A R. 245-246) certain additional modifications to these contracts were filed as exhibits in the respective

cases. (In the Carbide cases this stipulation was inadvertently omitted from the printed record and we anticipate it will be supplied by agreement of the parties before the hearing.)

In general these modifications have dealt with changes in the scope and amount of work to be performed for the Commission, including changes in the amounts of money obligated under each contract. One of the modifications to the Carbide contract (Exhibit 31) adds new contract language and effects several changes in the methods of operation by eliminating the necessity of certain Government approvals theretofore required. This modification also revised Article VI-C pertaining to advances of funds and Article VIII-A pertaining to passage of title of property procured for the contract work. The article pertaining to advances of funds was included in the Roane-Anderson contract by Modification 19 (Exhibit 30).

Modification 20 (Exhibit 32) to the Roane-Anderson contract is a complete rewrite of the contract provisions and states the entire confract as it existed between Roane-Anderson and the Government effective October 1, 1948.

QUESTIONS PRESENTED BY THESE CASES

These cases present to the Court the questions whether the Tennessee Retailers' Sales Tax Act, being Chapter 3 of the Public Acts of the General Assembly for Tennessee for the year 1947, as amended, can be applied to purchases made by the Respondent contractors through whom the U.S. Atomic Energy Commission carries on a major part of its activities at Oak Ridge, Tennessee; and if so, to what extent.

The Tennessee Sales Tax Act purports to levy a tax on persons exercising the privilege of carrying on the business of selling tangible personal property in the State, and also on persons for the privilege of using, storing for use, or consumption of such property in the State. (Chapter 3, Public Acts of the General Assembly for Tennessee, 1947,

Section 3.) The Sales Tax part of the Act requires retailers to add the tax to the sales price of property subject to the tax and to collect the tax from purchasers. (Chapter 3, Public Acts, 194., Section 4.) By regulations promulgated by the Tennessee Commissioner of Finance and Taxation, an exemption is provided for sales of property covered by the Act made to the Government of the United States, its departments or agencies when the "sale of tangible personal property is made and billed directly to the Federal Government, its departments or agencies, and is paid for directly by the Federal Government" (Rule 58). The Supreme Court of Tennessee, in Hooten v. Carson, 186 Tenn. 282, 209 S.W. (2) 273, held that this Act levied a privilege tax upon vendors for the privilege of engaging in the business of making retail sales. More recently, however, that Court, in Madison Suburban Utility District v. Carson (June 9, 1950), 191 Tenn. 300, 232 S.W. (2) 277, held that both the sales tax and the use tax were inapplicable where the purchaser's revenue and property had been exempted from taxation, and stated "all tax measures when called in question in the courts should be determined by their practical operation and effect rather than by what they are named" (232 S.W. (2) at p. 280).

In the Temessee Supreme Court the argument was made that the Respondent Contractors of the Atomic Energy Commission in these cases were exempt from the payment of both the Tennessee Sales and Use Tax. by reason of the implied immunity of the Federal Government from state taxation or regulation under the Federal Constitution, and by reason of the tax immunity provision contained in section 9 (b) of the Atomic Energy Act. While the Tennessee Supreme Court held the Respondents' purchases were not subject to the Tennessee Sales and Use Tax statute based on section 9 (b) of the Atomic Energy Act, that Court also held that Respondents were "independent contractors" and not entitled to such an exemption under the doctrine of implied immunity of the Federal Government from state taxation or regulation. The Petitioner

has sought review of the Tennessee Supreme Court's interpretation of the Atomic Energy Act and its opinion and decision exempting the Respondents from the Tennessee tax.

The United States Government, as intervenor, argued for the meaning and interpretation of section 9 (b) of the Atomic Energy Act contended for by the Respondents before the Tennessee Supreme Court, and will brief and argue that ground for immunity before this Court. The contractor Respondents concur in the position and arguments made by the Government with respect to the Atomic Energy Act.

This memorandum is being filed in order to set out, at greater length, the facts and circumstances of the relationship between the Commission and Roane-Anderson and Carbide, so that the Court will have that information available in its consideration of the tax exemption clause of Section 9 (b)

DISCUSSION

The Close and Integral Relationship Between the Atomic Energy Commission and the Respondent Contractors

A. Background and Summary of the Atomic Energy Program

The Atomic Energy Commission, either directly or through various contractors, carries on a wide and extensive program for the Government in the field of atomic energy, including the production of materials for atomic weapons, and the production of radioactive materials for use in research and development activities relating to atomic energy. The plants and facilities of the Government engaged in this work are distributed throughout the United States, and are operated at present almost entirely by private, business and educational organizations under contract with the Commission. This arrangement and method of carrying out the functions of the Atomic Energy

Act has been adopted by the Commission as the most desirable method for adequately and efficiently carrying out its work.

The Government's undertaking in this field is so gigantic and the circumstances involved so novel, that not only has it been necessary, for the Government to enlist and retain the services of competent and skilled industrial and scientific organizations to build and operate its plants, but also to completely build and provide for the operation of three entirely new cities—Oak Ridge, Tennessee, Los

Alamos, New Mexico, and Richland, Washington.

The principal contractor of the Commission in Oak Ridge for the operation of its plants there is the Carbide & Carbon Chemicals Corporation. The town management, contractor for Oak Ridge is the Roane-Anderson Company. In addition to these contractors the Commission also engages a number of other cost-type contractors to perform many of the associate or sustaining services needed in the efficient operation of the Commission's programs and functions carried on in Oak Ridge. These include, for example, contractors to operate the town bus system, city hospital, and firms to plan and design plant, town, and related construction and development; as well as firms to carry on the construction of different plant projects. Certain phases of the Commission's programs for training and research are carried on by non-profit organizations under cost-type contracts with the Commission; for example, the Oak Ridge Institute of Nuclear Studies and the University of Tennessee. The operation of the Oak Ridge School System is carried out by a cost-type contract with the Anderson County Board of Education.

The Oak Ridge installations and facilities are entirely Government-owned, and the jurisdiction of the Commission over them is established by the Atomic Energy Act and the Executive Order which the President issued pursant to that Act. The production facilities at Oak Ridge are operated by Carbide, under a cost-plus-fixed-fee type operating con-

tract. Production activities are concentrated on the production of Uranium-235, fissionable material, and it will be recalled that by law the Commission is given a monopoly over the production of fissionable material. In one plant (K-25) operated by Carbide the Uranium-235 is separated from Uranium-238 by a process of gaseous diffusion; in another plant (Y-12) it can be separated by an electromagnetic process. Carbide now also operates the Oak Ridge National Laboratory (X-10), a Commission-owned laboratory for atomic energy research formerly operated by Monsanto Chemical Company, but which was transferred to Carbide operation effective March 1, 1948. In this laboratory research of fundamental importance to the production and use of fissionable material is carried on, and radioactive isotopes which are proving of enormous benefit to medical, biological, agricultural, and industrial research of all kinds, are produced and distributed.

The town of Oak Ridge is located on the Commission-owned site, and exists for the sole purpose of providing necessary community facilities and services to the multitude of persons employed by the Commission and its contractors at the Oak Ridge installation. Most of the necessary town management functions and services are carried out by Roane-Anderson Company, pursuant to its cost-plus-fixed-fee contract. Thus, Roane-Anderson not only furnishes normal municipal services, such as the operation of utilities, fire protection, garbage disposal, and maintenance of roads and streets, but also handles the Commission's landlord functions for the residential and commercial buildings in the community, and performs a host of other services necessary to the welfare of the employees at this atomic energy facility.

B. Relationship Between Respondent Contractors and Atomic Energy Commission.

Since this Court's decision in Alabama v. King and Boozer, 314 U.S. 1, holding that the cost-plus-fixed-fee contractors of the Government there involved were not exempt

from the payment of the Alabama sales tax, considerable emphasis has been placed in other cases on the identification of "cost-type" contractors performing work for the Government as "independent contractors," or as "agents or instrumentalities" of the Government. The Tennessee Supreme Court in considering the contract relationship between the Respondent contractors and the Commission ruled that the doctrine of implied immunity from state taxation had no application because the Respondents were "inde--pendent contractors." One of the Judges, in a concurring opinion also refuting that an immunity from the Tennessee sales tax existed in the absence of the express language of section 9 (b) of the Atomic Energy Act, characterized the Respondents as "independent contractors who have authority to act as purchasing agents for the Atomic Energy Commission * * * " (italics added) (Carb. R. 23):

The term "independent contractor" has been often defined and applied in determining relationships between persons, either to establish or disclaim a master-servant relation for purposes of workmens' compensation benefits or legal responsibility for negligent acts of another. When this descriptive term is applied to the Respondent contractors as indicative of their relationship to and with the Atomic Energy Commission, insofar as it is used to determine the applicability of or exemption from the Tennessee sales tax statute, there exists no general similarity between the usually accepted and understood definition of an "independent contractor" and the facts and legal relation of the Respondent contractors in this case to the Commission.

An analysis of the control exercised, contract terms, and working procedures between the Respondent contractors and the Commission clearly demonstrates that the existing relationship is not actually one of a truly "independent" contractor whatever may be the traditional and classic definition of the term "independent contractor".

ATOMIC ENERGY ACT.

The Atomic Energy Commission under the Atomic Energy Act is directed and authorized to carry on certain works and programs, and to provide for various related or necessary services. In connection with the carrying out of these functions the Congress, by statute, has imposed certain controls and requirements which must be exercised by the Commission in the conduct of the atomic energy program. In the field of operating Commission-owned facilities for the production of fissionable materials, section 4 of the Atomic Energy Act requires that every contract must contain provisions restricting the right of subcontracting the work, obligating the contractor to make such reports to the Commission as it may deem appropriate, requiring him to submit to frequent inspections, and obligating him to comply with all safety and security requirements of the Commission. Another section of the Atomic Energy Act is devoted entirely to the responsibilities of, and policies to be followed by, the Commission in the protection of "restricted data." Because of the military values inherent from atomic energy, many activities which might otherwise be carried on by private business are expressly prohibited under the Atomic Energy Act, except as they may be done for, or under arrangements with the Commission. Recognizing many possible benefits and hazards which might arise from the development of atomic energy, the Congress has specifically directed that semi-annual reports "concerning the activities of the Commission" should be made to the Congress. The overall policy with respect to the methods and arrangements by which the Commission's work and the development of atomic energy are to be carried on are generally stated in section 1 of the Act. These statutory controls and policy directives are applicable to the Respondents' work for the Commission, and constitute the source and requirement for some of the controls, restrictions, and supervision exercised by the Commission over the work of the Respondent contractors.

CONTRACT PREVISIONS AND FACTS. (References to the records are made in the statement of facts, pages 2-26).

Both of the Respondent contractors were engaged in the performance of their contracts with the Government long before the adoption of the Atomic Energy Act and the transfer of the atomic energy program to the Commission. The initial contracts, and the controls and supervision imposed thereunder, were executed by the Manhattan Engineer District, for the Government, at a time when great secrecy, uncertainty, and urgent need existed. Their operations constituted a part of an overall Government-directed, owned, and planned effort to develop and produce atomic weapons.

The relationship between the Commission and the Respondent contractors, as established by the contract provisions and the record, was and is a very special kind. Roane-Anderson was established for the sole purpose of carrying out its community management activities under contract with the Commission; and Carbide has set up a separate division to carry out its contract with the Commission. The contracts represent a long-term, continuing relationship between Government and industry. They do not contemplate the performance of particular narrowly-defined tasks for which the outlines are fully known in advance, but were entered into and have been performed with knowledge and understanding that operations are subject to continual revision, modification, and change, both in the light of technical development and as a result of the evolution of Commission policy.

The operational activities carried on by the Respondent contractors are integrated parts of programs for which the Commission is responsible. The nature and scope of these programs, and of the integral parts thereof, are subject to determinations by the Commission, usually after consultation of course with the contractors, and to continuing review and modification by the Commission in the light of changing circumstances and Congressional and Presidential decisions. The land, production plants, raw materials, equip-

ment, supplies, plans, designs, and records used in the operation of the facilities, as well as the products of the operation, belong to the Commission. Knowledge, techniques, inventions and discoveries gained from the work are subject to strict control by the Commission. The houses, buildings, and other properties used to provide housing and other needs and services to the employees engaged in the program at Oak Ridge are owned by the Commission. The work of the contractors is subject to close supervision at all stages and at all times by representatives of the Commission who have offices at the Oak Ridge site, and whose chief responsibilities center on the operations carried on by the These Commission representa-Respondent contractors. tives establish general policies for the activities of each contractor and for the coordination of their activities with other contractors, supervise and inspect their combined fields of work, review subcontracts and purchases for approval, and inspect and audit the records and accounts of the contractors, and cooperate with the contractors in the solution of the manifold problems connected with the operation of the atomic energy facilities and the town of Oak Ridge. The work must be carried on in accordance with safety and security regulations of the Commission, and those employees of the contractors who will have access to restricted data are investigated by the FBI and are subject to security clearance by the Commission. Key personnel of the contractors' organizations may be employed only with the approval of the Commission. The salaries of all of their employees are controlled by policies and standards approved by the Commission, and the Commission may direct the dismissal of such employees whom the Commission ceems "incompetent, careless or insubordinate," or whose continued employment is deemed inimical to the public interest.

At the same time the Respondent contractors are not required to risk their own money in the operation of Commission facilities. The contracts provide that the Government will reimburse the contractors for the entire costs of the

work. The contracts relieve the contractors of pecuniary responsibility for property used in the work, and also contain rather broad provisions for holding the contractors harmess against losses suffered on account of or arising out. of the work. The Carbide contract specifically provides that Carbide shall not be obligated to use any of its own funds in the performance of work under the contract, and further provides that, upon request of the contractor, the Government shall advance monies to be used for carrying out the purposes of the contract. Under this last provision Carbide has used only Government money for activities under its contract. Although Roane-Anderson originally used some. of its own money in performing its contract, revenues which it collected from concessionaires and occupants of housing in Oak Ridge soon made up the greater part of funds used in the contract. Its contract provides that such monies collected should be used to reduce the cost of the work. Since October, 1948, Roane-Anderson has been receiving advances to carry on its work in the same manner as Carbide.

Except for the uranium production materials, most of the materials and supplies necessary to the operation of . these Commission facilities are puchased by or through the contractors. By contract the Commission reserves the right to pay suppliers directly, but customarily permits payments to be made by the contractors, who are then reimbursed by the advancement of additional funds from the Government and the use of revenues from Commission properties. Although the contracts of both Carbide and Roane-Anderson originally provided that title to articles acquired under the contracts should pass to the Government at a point designated by the contracting officer, the evidence shows clearly that as a matter of practice title to such articles has never been considered to be in the con-· tractors but has always been treated as having passed to the Government at the time title passed from the vendor. Modification No. 24 to the Carbide contract and Modification No. 20 to the Roane-Anderson contract revised the title articles

in each of these contracts to provide specifically that title to materials purchased for the contract work should pass directly from the vendor to the Government. While these changes affected the language of the contracts, they merely conformed the contract language in each case to the intent and existing practices of the parties and did not create new conditions with respect to passage of title. Moreover, Article I, paragraph 3 and Article VIII, paragraph 3 (c) of the Roane-Anderson contract provide expressly that in the procurement of supplies necessary to the performance of work under the contract, Roane-Anderson should act as the agent of the Government, and all procurements by this Respondent have been made in this capacity.

COMPARISON WITH SITUATION IN THE KING AND BOOZER CASE.

Although we do not urge, in this Court, that the decision below be sustained on the ground that the transactions here are entitled to an implied Constitutional immunity, it is appropriate to discuss the distinctions between these cases and the King and Boozer case. The situation in the King and Boozer case is similar to the relationship between the Respondent contractors and the Commission only in certain superficial respects.

In the King and Boozer case, as in these, the contractors who made the taxable purchases held cost-plus-fixed-fee contracts with the Government, under which the Government reserved the right to restrict or control the contractors in many respects, including the right to approve in advance purchases made by the contractors in excess of a certain amount. In that case, the contractors were not permitted to bind the credit of the Government in making purchases. In these cases, Article I, paragraph 3 and Article VIII, paragraph 3 (c) of the Roane-Anderson contract provide that Roane-Anderson should act as the agent of the Government in the procurement of supplies necessary to the performance of its contract, and the purchase order used by Carbide shows that that Company's credit is not pledged on any

purchase. In these cases, both of the Respondents purchase supplies from advances of Commission funds, or from revenues received from the rental or disposal of Commission property or from services rendered to third parties as a part of the Respondent's contract work.

In the King and Boozer case the Government, by its contract, was buying a particular job of construction. The relationship contemplated by the contract, perhaps, was no different than that between any agency, private or public, and a contractor bound to do a particular and delineable job of an ordinary character-in the King and Boozer case the construction of an army camp. The relationship between the Commission and the Respondent contractors is vastly different, not only in its formal aspects but also in its purposes and practical effects. The contracts involved in these cases, as pointed out above, contemplate a longterm, continuing, and intimate relationship between the representatives of the contractor, of other contractors participating in various phases of the overall program, and those of the Government who are assigned to the task of operating Commission facilities and carrying out the Commission's program at the Oak Ridge site.

As has already been seen, the production aspects of this program-source materials, production facilities, by-product materials, and end product—are committed by statute to a Government monopoly, which the Congress placed under the jurisdiction of the Commission. The Respondent contractors, and others, are the principal means whereby the Commission carries on its activities at the major Commission installations pursuant to the Atomic Energy Act. These activities are vital to the common defense and security of the nation, and the functions performed by the. Respondent contractors are essentially those of the Commission and governmental in character. Unlike the situafon in the King and Bower case, the Respondent contractors here are management contractors, who, in essence. supply the services of persons with executive, engineering and other knowledge and experience to assist in carrying

out parts of programs to the extent and in the manner directed by the Commission; and whose day to day operations constitute the activities which the Commission is directed and authorized to carry out.

The contracts and relationships here involved are not framed with reference to a particular and definable task as in the King and Boozer case, but are rather built squarely upon the everyday and unprecedented uncertainties and difficulties of the atomic energy program. As a result, the Commission relies beavily upon the scientific, technical, and management competence of its contractors; and the Commission, on its side bears the huge costs and risks involved in the program and assumes responsibility for policy direction. This cooperative and necessary relation. ship has evolved into a fabric of integrated activities and responsibilities between particular Commission contractors, and between them and the Commission, which is farremoved from the Government's relationship with the contractors involved in the King and Boozer case. Insofar as the production facilities at Oak Ridge are concerned it should be remembered that they are but a few of many cogs which must mesh and function with plants and other facilities of the Commission in various parts of the country to accomplish the primary program of the Commission today: Viewed in this light the operations carried on by the Respondent Carbide, and by other contractors operating other Commission facilities, are but the integral parts of the overall Commission-directed, owned, and controlled enterprise for producing atomic weapons and carrying on the development of atomic energy on a national scale.

In considering the particular aspects of the relationship involved in the procurement of materials and supplies for the program, consideration must be given to more than the formal relations of written approvals, terms of purchase orders, and reimbursement orders. It must be borne in mind that materials, equipment and supplies essential to the operation of the production plants, the laboratories, and muncipal facilities at Oak Ridge (other than uranium

materials), are in large part procured by the Respondent contractors. However, the Commission cooperates closely with the contractors in ascertaining the need for supplies and in formulating procurement programs; it advances funds necessary for procurement, and replenishes those funds by means of the formal machinery or reimbursement; it cooperates in establishing specifications, selecting vendors, inspecting materials, and planning the most efficient and suitable use for supplies in the operation of facilities; while Commission offices and facilities at other locations arrange for supplies of uranium materials processed in the great gaseous diffusion plants, and Commission offices and facilities elsewhere take the output from Oak Ridge.

It is clear that the formal terms of the relationship, the contractual provisions for reimbursement, approvals, passage of title, etc., are only a partial index of the relationship between the Commission and the Respondent contractors.

C. Respondents as "Management Contractors" for the Atomic Energy Commission.

The relationship of the Respondent contractors to the Commission, as described above and contrasted to the relationships involved in the King and Boozer case, is clearly something different in the overall from that existing between the Government and the contractors in that case or asually understood and intended when the term "independent contractor" is applied.

The relationship of the Respondents to the Commission in these cases can be most aptly described as that of "management contractors" for the Afomic Energy Commission, in that they carry out for the Commission, under and in accordance with such policies, supervision, and controls as may be established by the Commission, particular portions of the Commission's programs and activities. Indeed, the Senate Report on S. 1717 (McMahon bill, which became the Atomic Energy Act), in commenting on section 4 (c) of the Act said:

"Wherever possible the Committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. Thus, the bill permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry." (S. Report No. 1211, 79th Congress) (italies added).

While this section of the Atomic Energy Act specifically relates only to production activities, it is to be recognized that both of the Respondent contractors were actively engaged in carrying out their respective operations in connection with the atomic energy program prior to the passage of this Act, and the report referred to above was made after extensive hearings had been conducted covering the entire field of atomic energy, including past operations and recommendations for future methods of operation, control, and development, More recently, as regards the operation of the Commission-owned community facilities, the Congress has seen fit to limit expressly the amount to be paid as fees to contractors engaged in "community man; agement"-again recognizing that the Commission-contractor relationship here was one of owner and manager (General Appropriation Act, 1951 (Pub. Law 759, 81st Congress, 2d Sess.,) Chapter VIII, Title I; Independent Offices Appropriation Act, 1952 (Pub. Law 137, 82d Congress, 1st Sess.), Title I).

Certainly the operation of an Atomic Energy Commission facility for the production of fissionable material is not Carbide's own business, for, by statute, only the Commission can own these facilities, and the operation of them is for the purpose of producing fissionable materials for the Commission. The contract with the Respondent Carbide and the facts clearly show that the Commission, and before it the Manhattan Engineer District, intended and has exercised considerable control over the operation of these plants. The Commission has not, and does not, permit these

facilities to be operated on a hands-off basis, looking only to the final result as the limit of its control over the operations. To a large extent, this Respondent's activities for the Commission also pertain to the conduct of research and development in these facilities in accordance with programs, policies, and instructions of the Commission. How could such functions be carried on otherwise when the policy control of what is done in the atomic energy program lies with the Commission?

The Respondent Roane-Anderson Company has been engaged in the management and operation of the Commission's real estate holdings in Oak Ridge, Tennessee, including the licensing of residential, dormitory, and commercial space in buildings, and the providing of most of the usual municipal-type services in this wholly-owned Commission town; all subject to the control, supervision, and direction of the Commission, and to such housing, municipal, and real estate policies as the Commission establishes.

Both of the Respondent contractors are paid a management fee for their services, while the primary objectives, costs, risks, and overall responsibility for the effectiveness and success of the program remain with the Commission. In such circumstances it is hard to visualize these Respondent contractors as anything but managers for the Commission in the conduct of this national enterprise. Certainly their relationship with the Commission defies the classic meaning and interpretation given the term "independent contractor," The need for, or occasion to exercise or require, controls or supervision over the managers, within policies established by the Commission, varies with changes in national policy, the exigencies of the overall program, the degrees of coordination required in various phases of the program, and other factors. The fact that the Commission may afford the managers more discretion or broader authority is evidence more of satisfaction and proof of performance, rather than of a conclusion that Respondents are truly independent, operating extensive Government

plants and properties, and spending large sums of Commission money, without control or supervision.

As "management contractors" the Respondents need not, for all purposes, be one and the same as "agents or instrumentalities" of the Government or the Commission, within a stereotyped meaning of this term. Obviously, they would not undertake regulatory functions of the Commission, for example; nor have all of the responsibilities and: functions of the Commission; nor be subject to all of the limitations and restrictions of the Commission and its employees. As management contractors, however, operating facilities of the Commission utilizing funds of, or at the expense of, the Commission, and responsible to the Commission for the manner and performance of the work they have undertaken, it would appear they should not be so remoted from the Commission as to be considered outside of the Commission's "activities." The operations carried on by the Respondent contractors are those of the Commission, for which it is responsible. The tax here involved is an attempt to tax the means by which the Commission is carrying on its functions; i.e., the "activities of the Commission."

In summary, the facts in these cases show clearly that Respondent Carbide uses advances of Commission funds or other Commission revenues with which to make procurements for the contract work, that title to property so purchased passes directly from the supplier to the Government and that Carbide's only obligation on such orders is to pay from the funds which the Government has agreed to supply for purposes of carrying on the work.

With respect to the Respondent Roane-Anderson its contract expressly directs the Respondent to make all purchases "in its name as agent for and on behalf of the United States," and all purchases for the contract work have been made in this capacity.

In addition all of such purchases by the Respondent Roane-Anderson are now made out of advances of Commission funds, or other Commission revenues (although this may not have been the case prior to 1947 in all instances), and title to the property purchased passes directly to the Government.

For these reasons, in addition to those contained in the brief filed on behalf of the United States, it is contended that purchases and use of property by both of the contractor Respondents are entitled to an exemption, under section 9 (b) of the Atomic Energy Act, from the Tennessee sales and use taxes.

Respectfully submitted,

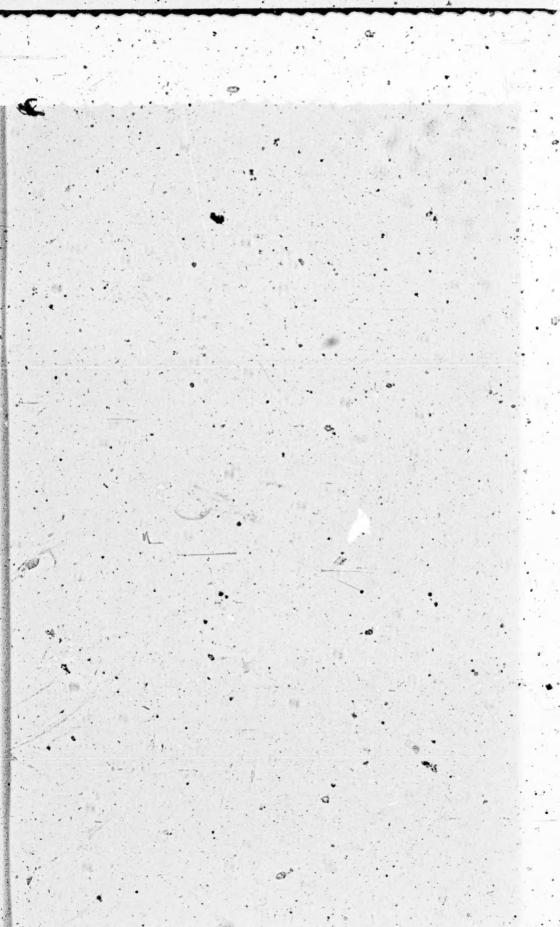
S. FRANK FOWLER, Counsel for Respondents,

CARBIDE AND CARBON CHEMICALS
CORPORATION,

DIAMOND COAL MINING COMPANY.

ROANE-ANDERSON COMPANY,
WILSON-WEESNER-WILKINSON
COMPANY.

DECEMBER 1951



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OCTOBER TERM: 1951

SAM K. CABSON, COMMISSIONER OF FINANCE AND TAXATION, ETC., PETITIONER

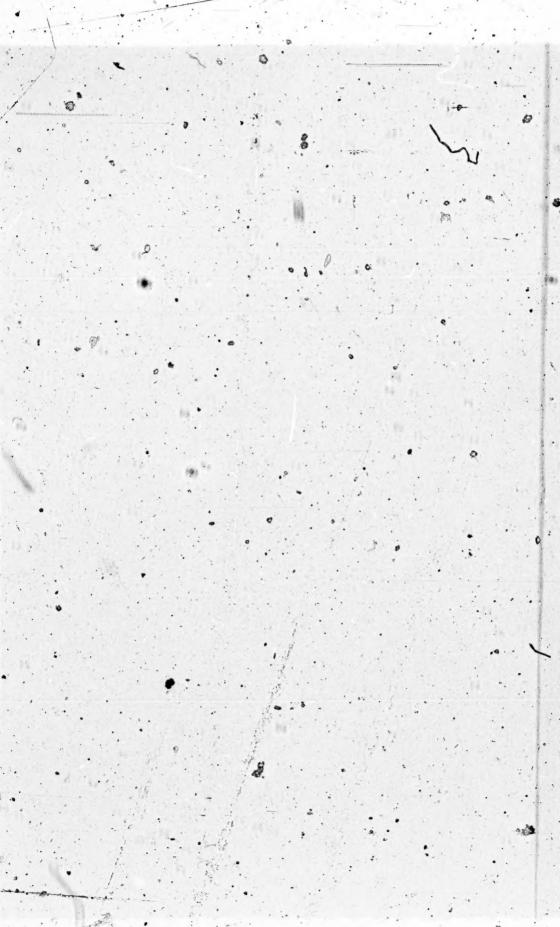
ROANE-ANDERSON COMPANY, UNITED STATES, ET AL.

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXASION, ETC., PETITIONER

CARBIDE AND CARBON CHEMICALS CORP., UNITED STATES, ET AL.

ON WRITS OF CERTIORARY TO THE SUPREME COUNTY OF

BRIEF FOR THE UNITED STATES, INTERVENOR-RESPONDENT



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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 186

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION, ETC., PETITIONER

ROANE-ANDERSON COMPANY, UNITED STATES, ET AL.

No. 187

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXATION, ETC., PETITIONER

CARBIDE AND CARBON CHEMICALS CORP., UNITED STATES, ET AL.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR THE UNITED STATES, INTERVENOR-RESPONDENT

OPINIONS BELOW

The majority, concurring, and dissenting opinions of the Supreme Court of Tennessee (R. in No. 186, at 6-30; R. in No. 187, at 5-29) are reported

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at 239 S. W. (2d).27. The opinion of the Chancery Court of Davidson County, Tennessee (R. in No. 186, at 50-59; R. in No. 187, at 47-56) has not been reported.

JURISDICTION

The judgments of the Supreme Court of Tennessee were entered on March 9, 1951 (R. in No. 186, at 1-4; R. in No. 187, at 1-4). By order of Mr. Justice Reed, dated May 17, 1951, the time for filing petitions for writs of certiorari was extended to and including August 6, 1951 (R. in No. 186, at 249; R. in No. 187, at 247). The petitions for writs of certificari were filed on July 13, 1951, and were granted on October 15, 1951 (R. in No. 186, at 249; R. in No. 187, at 247).

QUESTION PRESENTED

Whether the purchase and use of materials and supplies by cost-type contractors of the Atomic Energy Commission, in the performance of their contracts, are exempted by Section 9(b) of the Atomic Energy Act of 1946 from Tennessee's sales and use taxes.

STATUTES INVOLVED

Section 9(b) of the Atomic Energy Act of 1946, c. 724, 60 Stat. 755 (42 U. S. C. 1809 (b)), provides as follows:

(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it. was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing . to the State or local government by reason of such activities shall be considered in determining the amount of the payment. Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

Other portions of the Atomic Energy Act of 1946 are reprinted in the Appendix, infra pp. 60-68, together with pertinent portions of the Tennessee Retailers' Sales Tax Act.

STATEMENT

In 1947, Tennessee adopted its Retailers' Sales Tax Act. Chap. 3, Public Acts of 1947. The statute imposes (a) a sales tax on the sale and purchase of certain materials and supplies in Tennes-

see, and (b) a use tax on the use within the state of certain materials and supplies purchased elsewhere. The present cases arise out of the imposition by the State of these sales and use taxes in connection with materials and supplies sold to, or used by, cost-type contractors with the Atomic Energy Commission.

1. The proceedings below: In the Fall of 1947, respondents Roane-Anderson Company and Carbide and Carbon Chemicals Corporation-both cost-type contractors with the Atomic Energy Commission (infra, pp. 7-12)—paid under protest amounts demanded by petitioner, the State Commissioner of Finance and Taxation, as use taxes on the use of equipment purchased by these respondents in interstate commerce, which was delivered to them at Oak Ridge, Tennessee, and used by them in the performance of their contracts with the Commission (R. in No. 186, at 7, 11, 51; R. in No. 187, at 6, 10, 48). At about the same time, respondents Wilson-Weesner-Wilkinson Company and Diamond Coal Mining Company-both of whom are merchants engaged in business in Tennessee-paid under protest sums demanded by petitioner as sales taxes on the sale to, and purchase by, respondents Roane-Anderson Company and Carbide and Carbon Chemicals Corporation, of certain goods (a machine and some coal) used by the latter companies in the performance of their contracts with the Commission (R. in No. 186, at 7, 11, 51; Rain No. 187, at 6, 10, 48).

Four suits were thereupon brought by the four companies, in the Chancery Court of Davidson County, to recover these taxes, as well as for an injunction restraining the application of the state sales or use tax to similar transactions. Roane-Anderson Company and Carbide and Carbon Chemicals Corporation each brought suit to recover the use taxes paid by them (R. in No. 186, at 11, 31-38, 51; R. in No. 187, at 10, 30-37, 48). Wilson-Weesner-Wilkinson Company and its vendee, Roane-Anderson Company, sued to recover the sales taxes paid initially by the vendor and then collected from the purchaser (R. in No. 186, at 11, 51, 88-96). Likewise, Diamond Coal Mining Company and its vendee, Carbide and Carbon Chemicals Corporation, brought an action to recover the sales taxes paid initially by the vendor and then collected from the purchaser (R. in No. 187, at 10, 48, 89-97).

The burden of the plaintiffs' position was that the taxes could not be validly imposed because of (a) the exemption from taxation accorded the Atomic Energy Commission and all "activities * * * of the Commission" by Section 9 (b) of the Atomic Energy Act and (b) the constitutional immunity of the United States and its agencies and instrumentalities from such taxation. Adopting the same position as the contractor plaintiffs, the United States sought leave to intervene as an interested party, and such intervention was allowed in

each case (R. in No. 186, at 7, 47-8, 48-9, 51-2, 105, 105-106; R. in No. 187, at 6, 46, 46-7, 49, 105, 106, 106-107).

Petitioner filed answers contending that the taxes were properly collected (R. in No. 186, at 39-45, 97-103; R. in No. 187, at 38-44, 98-104). After a trial, at which evidence was presented as to the terms, nature, and operation of the Commission's cost-type contracts, and the function of its cost-type operators such as the Roane-Anderson Company and Carbide and Carbon Chemicals Corporation, the chancellor held that both the sales and the use taxes were properly imposed (R. in No. 186, at 50-59; R. in No. 186, at 47-56). Decrees were accordingly entered dismissing the four bills and the United States' intervening petitions (R. in No. 186, at 85-87, 107-109; R. in No. 187, at 86-88, 107-110). Findings of fact were also made (R. in No. 186, at 68-84; R. in No. 187, at 67-85).

The substance of the chancery court's holding was that the Roane-Anderson Company and the Carbide and Carbon Chemicals Corporation are independent contractors with the Atomic Energy Commission, and sales to, or use of materials by, them are not exempt from state taxation either under the Federal Constitution or under Section 9(b) of the Atomic Energy Act (R. in No. 186, at 50-59; R. in No. 187, at 47-56).

On appeal, the Supreme Court of Tennessee reversed, holding that the State's sales and use taxes could not validly be imposed (R. in No. 186, at 1-4;

- R. in No. 187, at 1-4). The majority of the court agreed with the chancery court that the challenged taxes were not forbidden by the Constitution, standing alone, but held that they were prohibited by Section 9(b). Two judges dissented (R, in No. 186, at 6-30; R. in No. 187, at 5-29).
- 2. The relationship of Roane-Anderson Company and Carbide and Carbon Chemicals Corporation to the Atomic Energy Commission: The memorandum which is being filed on behalf of the contractor respondents describes in detail (a) the functions performed by Roane-Anderson Company and Carbide and Carbon Chemicals Corporation at Oak Ridge, (b) the relationship between those companies and the Atomic Energy Commission, (c) the terms of their contracts with the Commission, (d) the general course of operations under those contracts, and (e) the purchasing and procurement policies and practices of those contractors. In this brief we shall merely summarize the salient facts, as found by the courts below:
- a. Roane-Anderson Company. The Roane-Anderson Company, which was organized for the specific purpose, entered into a contract with the Manhattan District of the Corps of Engineers in February 1944, pursuant to Title II of the First War Powers Act, by which it agreed to manage, on a cost-plus-fixed-fec basis, the newly-created Government town of Oak Ridge, Tennessee, at which half of the Government's atomic energy plants

were located (R. in No. 186, at 9-10, 11, 69-70). Pursuant to the Atomic Energy Act of 1946, this contract was transferred, as of midnight, December 31, 1946, to the Atomic Energy Commission, and has been continued in force (R. in No. 186, at 70).

Under the contract, the Company agreed to "manage, operate, and/or maintain facilities, utilities, roads, services, properties, and appurtenances situated within" Oak Ridge. It has oper-. ated the town bus-system, cafeterias, dormitories, and the hospital, all of which were Governmentowned. At the present time, the company manages the Government-owned housing facilities, maintains the roads and streets, and the utility systems, and obtains concessionaires to operate businesses in Oak Ridge using Government-owned facilities and on Government-owned property. It also does certain maintenance and repair service on other Government-owned buildings and properties, and hires such municipal-type employees as policemen and firemen (R. in No. 186, at 9-10, 11, 71-73).

In the performance of its contract, the Company is always under the direct supervision and direction of the Government's contracting officer (R. in No. 186, at 13, 75), and this control is implemented in various ways. For instance, the Government has a large measure of direct control over the hiring, dismissal, and compensation of employees (R.

in No. 186, at 78); it must approve the rates and charges paid by those benefiting from or using Government property managed by the Company (R. in No. 186, at 77); it inspects and audits the Company's records and accounts (R. in No. 186, at 13).

As for procurement, the contract expressly provides that in the operation of the facilities and the procurement of all supplies the Company shall act as agent for the United States (R. in No. 186, at 75-6). At the time of the transactions involved a here, all purchases over \$2500 had to receive prior Government approval (R. in No. 186, at 75-6). The purchase orders indicate that the purchase is made as agent for the Government (R. in No. 186, at 76, 82), and sellers are directed to ship to the Atomic Energy Commission, care of Roane-Anderson Company (R. in No. 186, at 80). Under the contract with the Government, title to all materials purchased under the contract and for which the Company is entited to reimbursement "shall vest in the Government at such point or points as the contracting officer may designate in writing" (R. in No. 186, at 81). As a matter of practice, title to acquired materials and supplies has sever been considered to be in the contractor, but has always been treated as having passed to the Government at the time title passed from the vendor (R. in No. 186,

¹ In 1949, the contract was amended to raise this figure to \$10,000 (Exhibit 32, Article VIII, par. 3(c); see R. in No. 186, at 245-246).

at 14). Roane-Anderson Company owns none of the real or personal property which it operates, manages, or uses in the performance of its contract (R. in No. 186, at 10, 13, 14, 244-245).

The Company is to be reimbursed for all costs and expenses, including the cost of purchased materials and the taxes involved here (R. in No. 186, at 13-14, 77, 78). Reimbursement is ordinarily made out of the revenues the Company collects for the Government at Oak Ridge, as well as out of moneys advanced by the Government (R. in No. 186, at 14, 79-80). The Company has been reimbursed for the taxes which are the subject of this suit (R. in No. 186, at 83).

b. Carbide and Carbon Chemicals Corporation.
In November 1943, respondent Carbide and Carbon Chemicals Corporation entered into a contract with the Manhattan District of the Corps of Engineers, under Title II of the First War Powers Act, to operate certain Government-owned atomic energy plants at Oak Ridge (R. in No. 187, at 8-9, 68). The contract was on a cost-plus-fixed-fee basis. Like the Roane-Anderson contract, it was transferred to the Atomic Energy Commission as of midnight, December 31, 1946 (R. in No. 187, at 69).

² As of October 1, 1948, the contract was amended to provide specifically that title to acquired property should pass directly from the vendor or supplier to the Government at the delivery-point or at such other point as the Commission might designate in writing (Exhibit 32, Article IX; see R. in No. 186, at 245-246).

The Corporation agreed to operate for the Government the plants then being built for the production of U-235, to carry on research and experimental work, to provide consultant services, and to train personnel (R. in No. 187, at 9-10, 70-71). Under this agreement, the Corporation has operated for the Commission all of the Government-owned plants and facilities at Oak Ridge for the production of fissionable materials, and since 1948 it has also operated the Oak Ridge National Laboratory. It also carries on a research and development program (R. in No. 187, at 9-10, 72). The Corporation's work is subject to close and detailed supervision by the Commission (R. in No. 187, at 12, 83).

All raw materials processed in the plants operated by the Corporation are supplied by the Commission (R. in No. 187, at 76), but the contractor purchases other supplies and equipment for which it is entitled to reimbursement (R. in No. 187, at 74, 79). In-1947, purchases of more than \$2000 had to be approved by the Government (R. in No. 187, at 79, 81). The contract requires that the Corporation place orders in its own name and not bind the Government; the Corporation has placed a statement to that effect in its purchase orders, as well as the statement that its "only liability hereunder shall be to pay for materials or services

³ After the transactions involved here, the contract was amended to require approval only for purchases in excess of \$100,000 (Exhibit 31, p. 6; see R. in No. 187, at 243-244).

ordered hereunder out of funds supplied by the United States Government * * *" (R. in No. 187, at 55-6, 81). The title provision is the same as in the Roane-Anderson contract (R. in No. 187, at 75, 79-80), and the practice with respect to passage of title to materials and supplies has been the same (R. in No. 187, at 13). Supra, pp. 9-10. As with Roane-Anderson, Carbide owns none of the real or personal property making up the plants or used in the operation of the plants. (R. in No. 187, at 9, 12, 13, 241-242).

The Corporation has not used any of its own funds, and has secured payment and reimbursement from direct payments by the Government as well as from funds advanced to it by the Government (R. in No. 187, at 12-13, 74, 77-79). The taxes involved here were paid with Government monies (R. in No. 187, at 84).

SUMMARY OF ARGUMENT

We maintain that Section 9 (b) of the Atomic Energy Act, which "expressly" exempts from non-federal "taxation in any manner or form" the "activities * * * of the Commission" (as well as the Commission itself, its property, and income) prohibits state taxation of sales to, or use of materials by, the Commission's cost-type contractors. This is true regardless of whether these contractors are in 2 pendent contractors or agents, and regard-

^{*}As of October 1, 1948, the title provisions of the contract were morfiled in the same fashion as those of the Roane-Anderson contract. See fn. 2, supra, p. 10.

less of whether they would be entitled to constitutional immunity in the absence of a Congressional exemption.

A. Such tax exemption provisions are clearly within the power of Congress, and the State does not challenge the validity of the exemption if it is held to bar the taxes imposed here. The sole issue is one of the purpose and intent of Congress in establishing the exemption.

B. This Court's decisions lay down the pridciple that broadly-phrased federal exemption clauses of this type should be given a "broad construction" which pays close attention to "practical operation and effect" and does not "fritter away" the protection Congress thought it granted. See Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 31; Federal Land Bank v. Bismarck Lum- @ ber Co., 314 U.S. 95, 99-100; New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 673, 675. The emphatic tone and broad wording of Section 9 (b) are in full harmony with these admonitions, and likewise indicate that the major premise of interpretation should be that Congress meant to accord a wide freedom from state and local tax burdens.

C. In this light and under the Act's wording, it is entirely appropriate to read the exemption of the Commission's "activities" as including the purchases and uses involved here. There is certainly no linguistic barrier to treating the work

sion's direct sphere of action.

It is difficult to believe that the Congress which specifically authorized and contemplated this use of operating contractors, and at the same time "expressly" exempted all of the Commission's "activities" from "taxation in any manner or form", could have intended to limit the exemption to those functions which the Commission should choose to carry on directly, without contractor assistance. Congress must have been interested in the practical operation and effect of local taxation on the Commission's work, and not in the legal problem of the technical incidence of the tax on the contractor or on the Commission; and Congress contemplated that under the Act the Commission could make large-scale use of oper-

immunity, this Court has recently been unwilling to weigh economic burdens and has concerned itself with the problem of legal incidence, but Congress, as the Court has noted, has a different role. Congress can, and does, act with practical motivation and purpose and in the light of fiscal and economic considerations. We suggest that it must have done so here, and that it did not stop with merely restating existing constitutional immunities in the form in which petitioner thinks the Court has established them.

The broader meaning of "activities of the Commission"—to include functions performed through contractors—is also borne out by the use of that term in other portions of the Act:—the part of Section 9 (b) dealing with payments-in-lieu-of-taxes; Section 15, providing for a Joint Committee on Atomic Energy to study "the activities of the Atomic Energy Commission * * "; and Section 17, requiring reports to Congress concerning "the activities of the Commission".

The fact that the contractor, rather than the Commission, may be the taxpayer is immaterial. The Act exempts from taxation not only the Commission itself but also its "activities"; to that extent the exemption is granted in terms of the subject matter freed from taxation and not of the taxpayer exempted. This is a common method of federal tax immunization, in which a private taxpayer is accorded an exemption because of certain

dealings or connections with the Federal Government. E.g., Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 31; Maricopa County v. Valley National Bank, 318 U.S. 357.

D. The background and legislative history of the Atomic Energy Act confirm the conclusion reached on the face of the statute. Congress was well aware of the important wartime role of atomic energy. contractors. From the Manhattan District's experience, it also knew that the bulk of the new Commission's expenditures would probably flow from the construction and operation of its plants and facilities. If contractors were employed for this purpose, the mass of expenditures would be for their reimbursement and payment; if the Com- or mission were to perform these functions through its own employees, the expenditures would, of course, consist of direct payment for supplies, materials, and services. Perhaps the most significant factor in the legislative history of the tax exemption provision of Section 9 (b) is that at all stages of Congressional consideration of atomic a energy legislation, the tax exemption clauses of the measures under review (the May-Johnson and Mc-Mahen bills) were designed to be broad enough to cover the mass of the Commission's expenditures for operation of its plants and facilities-whichever way these operations could be lawfully carried on.

Under the first-considered May-Johnson bills

(H.R. 4280, H.R. 4566), which permitted the employment of operating contractors, the wide exemption was secured by characterizing the contractors as the Commission's agents and thus exempting their purchase and use transactions through the tax exemption accorded the Commission itself. However, the original McMahon bill (S. 1717), which ultimately became the Atomic Energy Act, forbade the Commission from using contractors to operate its production plants. But a broad tax exemption, in the practical sense, was also assured under this measure because the Commission's own employees would perform most of its functions and the exemption clause plainly covered all taxes imposed on the Commission itself.

When the McMahon bill was revised to authorize the employment of operating contractors, the exemption clause of the bill (which had previously covered only the Commission itself and its income and property) was simultanteously expanded to cover "activities of the Commission"—a phrase which the legislative history shows was used throughout the consideration of the May-Johnson and McMahon bills as of sufficient scope to cover all of the Commission's functions, including those performed through contractors. By this means, there was established a tax exemption of the same practical breadth as in the May-Johnson bills and in the original version of S. 1717. The bulk of the Commission's functions, whether performed di-

rectly or through contractors, was freed from the burden of state and local taxation.

E. Since Section 9 (b) applies broadly to all "activities of the Commission", it is immaterial whether the Tennessee sales tax be formally denominated a tax on the vendor or on the vendee. The tax, is mandatorily required, under criminal penalties, to be passed on to the purchaser, and the Commission's contractors are legally obligated to pay it. Whatever the legal incidence and the label, Section 9 (b) should apply in view of its broad purpose and wording.

In any event, the Tennessee statute does make the purchaser's status determinative, as the State Supreme Court, as held in the case of a local entity exempt from taxation. And if the matter of legal incidence and obligation be deemed relevant to the application of Section 9 (b), this Court can decide those issues for itself. In practical effect and impact, the tax clearly has the characteristics of a vendee tax.

ARGUMENT

The Supreme Court of Tennessee rejected, on the authority of Alabama v. King & Boozer, 314 U.S. 1, the contention that the purchase and use of materials by the Atomic Energy Commission's cost-type contractors are constitutionally immune from the State's sales and use taxes. It held, however, that Section 9(b) of the Atomic Energy Act established a statutory exemption which is applicments that the lower court erred in its resolution of the issue of constitutional immunity and that the decision below can be supported on constitutional grounds, apart from Section 9(b). But the respondents find it unnecessary to deal with that constitutional issue. Section 9(b) furnishes a statutory solution which the Supreme Court of Tennessee properly accepted. Whether or not the Constitution would bar the taxes involved in these cases if Congress had been silent, the express exemption declared by Congress in Section 9(b) does prohibit the imposition of Tennessee's sales and use taxes in the circumstances presented here.

SECTION 9(b) OF THE ATOMIC ENERGY ACT OF 1946
PROHIBITS STATE TAXATION OF SALES TO, OR USE
OF MATERIALS BY, THE ATOMIC ENERGY COMMISSION'S COST-TYPE CONTRACTORS

A. Constitutionality of Such Tax Exemption Provisions.

The controlling clause of Section 9(b) states:

The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

This is a specific tax exemption provision included by Congress in an important statute dealing with federal functions of prime significance. The State

has not challenged the constitutional power of Congress to enact such a provision or to bar these taxes (R. in No. 186, at 17-18; R. in No. 187, at 16). No such attack could well be made for recent decisions of this Court leave no doubt that Congress possesses the power to create exemptions of this type even though the Constitution, by itself, would not provide immunity in the particular cir-The general power to establish excumstances. emptions reasonably related to the performance of federal functions was announced and applied in Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 32-33; Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 102-104; Maricopa County v. Valley National Bank, 318 U.S. 357, 361, and Board of County Commissioners v. Seber, 318 U.S. 705, 715-719. See also Mayo v. United States, ?19 U.S. 441, 446-8; Oklahoma Tax Commission v. United States, 319 U.S. 598, 606-7; Smith v. Davis, 323 U.S. 111, 116-119; Oklahoma Tax Commission v. Texas Co., · 336 U.S. 342, 365-6.5

And a decade ago, in Alabama v. King & Boozer, 314 U.S. 1, 8, and Curry v. United States, 314 U.S.

Earlier cases recognizing the same principle are: Helvering v. Gerhardt, 304 U. S. 405, 411-12 (fn.); James v. Dravo Contracting Co., 302 U. S. 134, 161; Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 23; Trotter v. Tennessee, 290 U. S. 354; Fox Film Corp. v. Doyal, 286 U. S. 123, 127, 129; Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 578-9, 581; Smith v. Kansas City Title Co., 255 U. S. 180, 211-213; Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319, 323; Goudy v. Meath, 203 U. S. 146, 149-150; Central Pacific Rd. Co. v. California, 162 U.S. 91, 121, 125; Thomson v. Pacific Rd., 9 Wall. 579, 588-9, 592; Bank v. Supervisors, 7 Wall. 26, 30-1.

14, 18, the Court recognized the validity of a legislative exemption for Government cost-plus contractors in circumstances which petitioner and the lower courts both maintain are identical with those presented here. Substantially the same position was taken eighty years ago when Chief Justice Chase wrote that the Court did not doubt that

powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the government; may grant aids, by money or land, in preparation for, and in the performance of, such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them. [Thomson v. Pacific Rd., 9 Wall. 579, 588-9 (italics supplied).]

B. Broad Construction of Federal Tax Exemption Clauses

The sole issue, then, is one not of constitutional power but of Congressional purpose and intent in establishing the particular exemption. That inquiry, this Court has pointed out, must be pursued in the light not only of the exemption's special terms but also of the broad aim of all such exemptions to protect the functions and activities which

Congress has sought to immunize from state tax burdens. A hospitable reading is more in keeping with the general purpose and history of exemption clauses than a narrow and technical interpretation confining their scope as much as possible. See Pittman v. Home Owners' Loan Corp., 308 U.S. 2163 31; Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99-100; New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 673, 675.

In the Pittman case, for instance, the Court construed a clause exempting Home Owners' Loan Corporation "loans" as striking down a Maryland tax on mortgage-recording which was sought to be applied to HOLC mortgages. In order "to earry out the manifest purpose of the broad exemption" (italics supplied), the Court held that the exemption of "loans" covered the "entire process of lending, the debts which result therefrom and the mortgages given to the Corporation as security". 308 U.S., at 31.

Similarly, Bismarck Lumber held that the "unqualified term 'taxation'" and the "broad exemption accorded to 'every Federal land bank'" (314 U.S., at 99, 100) by Section 26 of the Federal Farm

[&]quot;The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation " " (italies supplied). Home Owners' Loan Act of 1933, Section 4 (c), c. 64, 48 Stat. 128, 130, 12 U.S.C. 1463 (c).

Loan Act' invalidated state sales taxes on a Federal land bank's purchases. The statutory protection could not "be frittered away" by limiting the exemption to the subjects specifically listed by Congress. 314 U.S., at 99. Significantly, the Court took occasion to support its view that the exemption before it was to be given a "broad construction" by stating that the legislative history of similar exemption clauses in other statutes supported that interpretation. 314 U.S., at 100.8

In the same vein of generous interpretation, the recent New Jersey Insurance Co. case refused to concern itself with narrow niceties of tax nomenclature or "accounting labels" in invalidating,

^{7 &}quot;That every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation * * * " Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360, 380, 12 U.S.C. 931.

In footnote 7, the Court referred specifically to the quick Congressional avoidance of the Court's decision in Baltimore National Bank v. State Tax Commission, 297 U.S. 209, by an amendment to the tax exemption clause of the Reconstruction Finance Corporation Act. The Baltimore National Bank case held that, notwithstanding the statutory exemption of the RFC from taxation, national bank shares held by it were subject to state and local taxation because R.S. 5219, 12 U.S.C. 548, provided that all shares of national banks could be taxed. Six weeks later, Congress passed the Act of March 20, 1936, c. 160, 49 Stat. 1185, 12 U.S.C. 51d, exempting the RFC from all such taxation, whether past or future. In Bismarck, the Court noted that the legislative history of the amendment showed that Congress was of the view that the original tax exemption had been intended to give as wide an immunity as possible to the "functions and activities" of the RFC.

under R.S. 3701, a state tax assessing an insurance company's intangibles which did not provide a deduction on account of the federal bonds owned by the company. The inquiry was "whether in practical operation and effect the tax is in part a tax upon federal bonds", contrary to the statute. 338 U.S., at 673.

The tone and words of the tax exemption provision involved here-Section 9(b)-are in full harmony with these admonitions to give a "broad exemption" a "broad construction" which pays. close attention to "practical operation and effect" and does not "fritter away" the protection Congress thought it granted. As a whole, the exemption in Section 9(b) is certainly "broad" and "unqualified" in its terms; it specifically covers not only the Commission itself, its "income" and "property", but also its "activities"; and it uses the significantly strong and inclusive words:-"are, hereby expressly exempted from taxation in any manner or form". On the face of the provision, it is evident that Congress meant to accord wide freedom from state and local tax burdens, and this. should be the major premise in answering the specific question of interpretation posed here.

⁹ "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." R.S. 3701, 31 U.S.C. 742.

C. The Terms of Section 9(b)

1. "Activities of the Commission" include the purchases and use involved here.

(a). The State Supreme Court held, and it is our position, that the "express" exemption of the "activities of the Commission" from taxation "in any manner or form" covers the payment of sales and use taxes by these cost-type contractors who perform, on the Commission's behalf, most important functions which admittedly the Commission is charged by the Atomic Energy Act with having performed and which it could perform, if it chose, through employees directly paid and controlled by itself. Roane-Anderson Company manages the famous Government-owned town of Oak Ridge (supra, pp. 7-10) -a function committed to the Commission by Section 12(a)(5) of the Act (infra, pp. 64-65). Carbide and Carbon Chemicals Corporation operates the Oak Ridge plants for production of fissionable materials (supra, pp. 10-12)—a function of evident significance which is specifically made a Government monopoly and imposed on the Commission by Section 4 (c) (1) and (2) (infra, pp. 61-63). In each case, the contractor is under the constant supervision and control of the Commission; in particular, all of the contractor's purchases and transactions above a nominal sum had to be approved by the Commission; and the Commission bears all the costs and expenses of the operation, including the sales and use taxes levied by the State. In both cases, the contractors are in the most substantial sense alter egos of the Commission and perform some of its most important work under its direction and control. Supra, pp. 7-12; Memorandum on behalf of the

contractor respondents.

There is obviously no linguistic difficulty in calling these functions integral parts of the Commission's "activities"-its direct sphere of actionregardless of whether they be carried on by its own employees or by contractors acting on its behalf and at its behest. In our day, the word "activities" has the widest of ranges,10 and can easily carry the general connotation of "affairs" or "sphere of action" or "functions". There need be no stretching of English to apply the term here..

(b). That "activities" should be given this wider meaning in Section 9(b) is suggested not only by the canon of liberal interpretation discussed above (supra, pp. 21-24) and by the emphatic character Congress has given to the tax exemption clause (supra, pp. 19, 24), but also by other strong internal

evidences in the Atomic Energy Act.11

Of greatest importance is the authorization Congress gave the Commission to make use of contractors in the operation of its plants and the

11 We leave the significant legislative history and background for separate treatment. Infra, pp. 38-53.

¹⁰ Compare "social activities", "business activities", "recreational activities", "combatant activities", "public activities", "governmental activities", etc.

carrying on of its functions. Section 4 (c)(2)
(infra, pp. 61-63) first directs the Commission "to
produce or to provide for the production of fission;
able material in its own facilities" (italics supplied), and then empowers the Commission "to the
extent deemed necessar! * * to make, or to
continue in effect, contracts with persons obligating them to produce fissionable material in facilities
owned by the Commission". Section 9(a) provides for the transfer to the Commission of Manhattan Engineer District "contracts", and both
the Roane-Anderson and the Carbide and Carbon
Chemicals contracts were so transferred by Executive Order No. 9816, December 31, 1946, 12 F.R.
37. Supra, pp. 8, 10.

It is difficult to believe that the Congress which thus authorized and contemplated the use of operating contractors in the performance of the Commission's gravest duties, and at the same time "expressly" exempted all the "activities" of the Commission from nonfederal "taxation in any manner or form", could have intended to limit the exemp-

¹² Section 4 (c) (2) also provides:

[&]quot;Any contract entered into under this section shall contain provisions (A) prohibiting the contractor with the Commission from subcontracting any part of the work he is obligated to perform under the contract, except as authorized by the Commission; and (B) obligating the contractor to make such reports to the Commission as it may deem appropriate with respect to his activities under the contract, to submit to frequent inspection by employees of the Commission of all such activities, and to comply with all safety and security regulations which may be prescribed by the Commission."

tion to those functions which the Commission should choose to carry on directly, without the assistance of operating contractors. In using these words and in establishing the exemption, Congress was interested in the practical operation and effect of local taxation on the Commission's far-flung and continuing functions, such as the production of fissionable material at its plants, and the providing of facilities and services for the housing, health, and welfare of its employees at places like Oak Ridge and Hanford. One of the essential requirements, in the maintenance and operation of these facilities, plants, and services is the procurement and use of supplies, and the taxes on the purchase and use transactions involved here are an immediate drain on the Commission's funds and a clear burden on the carrying out of its assigned program. The practical effect is precisely the same as if the Commission had dispensed with all operating contractors, and the State had imposed these taxes directly on use and purchase by the Commission.43 These are the matters in which a legislature declaring a broad tax exemption-and aware that the Commission's future operation, as in the past, might well be carried on through costplus contractors-would primarily be interested;

¹³ In Appendix B we have set out a letter from the Atomic Energy Commission giving some statistics as to the probable impact of state taxes on the Commission's functions, if the petitioner's views are accepted. *Infra*, pp. 69-71.

it would surely be much less concerned with the legal problem of the technical incidence of the tax.

This seems to us the pertinent distinction between the role of the Court and of Congress in declaring an exemption. Congress is not in the position of the Court which, finding itself unable and unwilling to make constitutional immunity turn on a weighing of the economic or practical burden of the tax (often, though not always, a speculative process for a court), has inclined toward the relatively simplé legal principle that such immunity exists only where the legal incidence of the tax is on the Government or its agencies-leaving to Congress the task of measuring and counteracting the economic incidence, interference, and burdens.14 Congress has now acted in the atomic energy field, and it would be most inappropriate to overlook its prime concern with fiscal and economic considerations and to equate its practical motivation and purpose with the far different ends of the Court in constitutionalimmunity cases.

To read Section 9 (b) in petitioner's way is to commit just that error. The tax exemption clause becomes identical with the Commission's constitu-

¹⁴ Alabama v. King & Boozer, 314 U.S. 1, 8-9; Curry v. United States, 314 U.S. 14, 18; Mayo v. United States, 319 U.S. 441, 447; cf. Helvering v. Gerhardt, 304 U.S. 405, 419-420, 421-422; Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 484-485, 487; United States v. Allegheny County, 322 U.S. 174, 190.

(R. in No. 186, at 22; R. in No. 187, at 21), and represents nothing more than a useless or unnecessarily cautious restatement of existing constitutional law. Congress may possibly have been doing only that when it enacted Section 9 (b), but in view of all the circumstances we have outlined thus far (supra, pp. 21 et seq.), we believe that the probabilities are strongly otherwise.

corners of the Atomic Energy Act, of the wider meaning of "activities * * * of the Commission" remain to be mentioned. The first three sentences of Section (b) authorize the Commission, under stated conditions and circumstances, to make payments to state and local governments in lieu of property taxes, "in order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation". Supra, pp. 2-3. It is to be noted, first, that there is an express withholding of submission to state and local real estate or property taxation. This is

¹⁵ Petitioner refers to several other tax exemption clauses as indicating that Congress is in the habit of simply spelling out the constitutional immunity (Pet. in No. 186, at 32; Pet. in No. 187, at 32-33). The examples cited are all of corporations which Congress could, quite realistically, fear might be held subject to state taxation because of their corporate form and type of activity.

unusual, and in itself indicates a purpose to grant a wide tax exemption.

Secondly, it seems significant that in the opening sentence of Section 9 (b) Congress speaks of rendering financial assistance to states and localities "in which the activities of the Commission are carried on". It is apparent that here the term "activities of the Commission" must include the functions performed by operating contractors, both because the Act contemplated that the Commission's most important work could be carried on, in the future, through such contractors, and also, and more importantly, because Congress was obviously thinking, mainly of activities at Oak

¹⁶ Section 5219, Revised Statutes of the United States (12 U.S.C. 548), which stems from the Act of June 3, 1864, c. 106, 13 Stat. 99, 111, Sec. 41, authorizing the creation of national banking associations, submits the real property of national banks to state taxation. Other statutes submitting federallyowned real property to state and local taxation, including Section 10 of the Reconstruction Finance Corporation Act of January 22, 1932, c. 8, 47, Stat. 5, 9, as amended by Section 3 of the 2Act of June 10, 1941, c. 190, 55 Stat. 248 (15 U.S.C. 610), were presumably based upon paragraph 3 in R.S. 5219. Among such statutes are the Federal Farm Loan Act, c. 245, 39 Stat. 360, 380, Sec. 26 (f2 U.S.C. 931, 933) (1916); Agricultural Credits Act of 1923, c. 252, 42 Stat. 1454, 1469, Sec. 211 (12 U.S.C. 1261); Federal Home Loan Bank Act, c. 522, 47 Stat. 725, 735, Sec. 18 (12 U.S.C. 1433) (1932); Home Owners' Loan Act of 1933, c. 64, 48 Stat. 128, 130, Sec. 4(c) (12 U.S.C. 1463(c)); Banking Act of 1933, c. 89, 48 Stat. 162, 177, Sec. 8 (12.U.S.C. 264(p)); Federal Farm Mortgage Corporation Act, c. 7, 48 Stat. 344, 347, Sec. 12 (12 U.S.C. 1020f) (1934); National Housing Act, c. 847, 48 Stat. 1246, 1252, 1255, 1257, Secs. 208, 307, 402, (12 U.S.C. 1714, 1722, 1725e) (1934); Act of March 8, 1938, c. 44, 52 Stat. 107, 108, Sec. 5 (15 U.S.C. 713a-5); Act of March 28, 1941, c. 31, 55 Stat. 55, 61, Sec. 1 (12 U.S.C. 1741).

Ridge (in Tennessee), Hanford (in Washington), and Los Alamos (in New Mexico), all of which had been, previously acquired by the Manhattan District and at which the chief functions had been performed during World War II by contractors. If "activities of the Commission", as used in the first sentence of Section 9 (b), is restricted to those functions performed by the Commission's own employees, little would be left to the Congressional direction regarding payments in lieu of taxes.

The state chancery court sought to avoid reading "activities" in the same broad sense throughout Section 9 (b) by singling out the use of the word "agents" in the second sentence which directs the Commission, in making "in lieu" payments, to take account of special burdens cast upon the States or locality by activities of the Commission, the Manhattan Engineer District or their agents". o Supra, pp. 2-3. The special chancellor inferred from the absence of "agents" in the subsequent tax exemption clause that only activities carried on by the Commission directly, through its own employees, were exempted (R. in No. 186, at 56-57; R. in No. 187, at 53-54), This textual finesse might possibly have pleased a nineteenth century , expert at common-law pleading, like Baron Parke, but it is hard to give it more than artistic credit in these days of less mechanical interpretation.

Even on its own formal level, the chancellor's reading cannot be accepted. It assumes that the Commission's "activities" are rigidly separate and apart from the "activities" of its "agents" (i.e., contractors), so far as Section 9 (b) is concerned. But as we have pointed out (supra, pp. 31-32), the opening sentence, which refers only to "the activities of the Commission" and does not mention "agents", makes little real sense if this separation is read into it. Moreover, the whole matter of "in lieu" payments would become internally inconsistent and unworkable. For the first sentence would permit "in lieu" payments to be made only to those areas in which "the activities of the Com-Imission" (in the narrow sense) were carried on, but the second and third sentences would require the Commission to consider, in determining the amount of the payment, the burdens and benefits not only of the "activities of the Commission" (in the narrow sense) but also of the "agents?" separate and independent "activities".

It seems more in accord with the text and with reality to assume that Congress retained the word "agents" in the second sentence of Section 9 (h) because someone wanted to make absolutely certain that the activities of the operating contractors were not omitted in determining, for the purpose of "in lieu" awards, the burdens and the benefits of the

Commission's activities. Throughout Section 9.
(b), the term "activities of the Commission" has the same broad coverage; the fact that it is spelled out more in detail in the second sentence does not narrow its meaning in the first and fourth sentences.

17 This conclusion is supported, we believe, by the Act's legislative history. As we point out below (in the section on background and legislative history the payment-in-liqu-of taxes and tax exemption provisions of S. 1717 (the bill which became the Atomic Energy Act), as it was originally in coduced, were taken bodily from the rival May-Johnson bills ? (H.R. 4280, H.R. 4566) (see infra, pp. 45-46, 47). The "in lieu" provision of the May-Johnson bills contained the reference to the burdens and benefits attributable to the "activities of the Commission", of the Manhattan Engineer District, "or their agents", which is now found in Section 9 (b) -but it also contained a general provision expressly defining and characterizing the Commission's contractors as its "agents". See infra, p. 46. We show below that in the May-Johnson bills the term "activities of the Commission" plainly had a very broad meaning, including functions performed through contracton. Infra, pp. 42-45. It is highly probable, therefore, that the reference to "agents" was added out of unnecessary caution, or perhaps because of the express statutory characterization of contractors as agents so as to make sure that the contractors' activities were considered in fixing the amount of o'in lieu" awards.

S. 1717 borrowed these "in lieu" clauses from the May-Johnson bills, but it did not take over the general definition of "agents" which had been included in the other measures. This borrowed reference, in the "in lieu" clauses, to the burdens and benefits attributable to "agents", remained throughout the revisions of S. 1717. It appears to have been a residue of the May-Johnson bills which was retained through caution, inertia, or inadvertence, and has no greater significance.

It is clear that the May-Johnson bills viewed operating contractors as "agents" of the Commission, regardless of whether they were independent contractors or agents in the conventional sense. As noted above, there was an express provision to that effect, and the Committee Report speaks of such contractors as "agents". See H. Rep. No. 1186, 79th Cong., 1st Sess., p. 11, quoted infra, pp. 44-45.

The broader reading we advocate is also borne out by Section 17 of the Act, dealing with the Commission's semi-annual reports to Congress. These reports, the statute says, are to concern the activities of the Commission's—the same phrase used in Section 9 (b). Here, too, it is obvious that the phrase cannot possibly have the narrow meaning ascribed by petitioner, since the Act authorized and contemplated the carrying on of the Commission's major functions through contractors. Supra, pp. 25-26. For the same reason, the term "activities of the Atomic Energy Commission" in Section 15, concerning the Jonet Committee on Atomic Energy, must likewise have the wider scope. 10

In short, in each of the three sections of the Act in which the term "activities of the Commission" is used (Sections 9, 15, 17), the broader meaning covering the functions performed by cost-type contractors seems both appropriate and required.

¹⁸ Section 17 provides:

The Commission shall submit to the Congress, in January and July of each year, a report concerning the activities of the Commission. The Commission shall include in such reports and shall at such other times as it deems desirable submit to the Congress, such recommendations for additional legislation as the Commission deems necessary or desirable. (Italics supplied.)

¹⁹ Section 15 establishes a Joint House and Senate Committee on Atomic Energy and provides, in part:

The joint committee shall make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use and control of atomic energy. The Commission shall keep the joint committee fully and currently informed with respect to the Commission's activities. * * (Italics supplied).

2. It is immaterial that the contractor may be the taxpayer.

No difficulty is raised by the assumption—which we make here for the purposes of our argument—that the tax is imposed on, and paid by, the contractor, rather than the Commission. Section 9 (b) excepts the Commission itself from "taxation in any manner or form", but it does not stop there. It also broadly excepts the "activities * * * of the Commission" from "taxation in any manner or form", and nowhere does it state or imply that the only "activities" immunized are those as to which the Commission is the taxpayer. In this part of the exemption clause, the phrasing is in terms of the subject matter freed from taxation rather than of the taxpayer exempted.

It is quite common for federal tax exemption provisions to deal in this fashion with a subject matter to be exempted, and thus to grant immunity to taxpayers who may be private persons and not federal agencies or instrumertalities. In Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 31, the Court indicated that the Maryland recording tax would also be invalid where a non-governmental person sought to record an HOL@ mortgage. It repeated what it had said in an earlier case: "whoever pays it it is a tax upon the mortgage and this is what is forbidden by the law of the United States." So here, even though the tax is initially

paid by the contractor, it is a tax upon the "activities" of the Atomic Energy Commission and that is what is forbidden by Section 9 (b).

A comparable recent case is Maricopa County v. Valley National Bank, 318 U.S. 357, in which an Arizona tax on a national bank's preferred stock owned by the Reconstruction Finance Corporation was invalidated as contrary to the federal act exempting such shares from state taxation. Suit was brought by the bank which, under the Arizona law, was the taxpayer, though, like respondent contractors here, it was statutorily entitled to reimbursement from the shareholder (i.e., the R.F.C.) on whom, the tax liability ultimately rested (318 U.S. at 359).

Numerous other decisions have applied or recognized the applicability of federal tax exemption statutes to taxes paid by private taxpayers and not by the Government or its agencies. See New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665; Board of County Commissioners v. Seber, 318 U.S. 705; Oklahoma Tax Commission v. United States, 319 U.S. 598, 606-607; Lawrence v. Shaw, 300 U.S. 245; United States v. Allegheny County, 322 U.S. 174, 187-189; and the cases cited in footnote 5, supra, p. 20. In each of these cases, the taxpayer was a private person who dealt with the United States, or was "a corporation having its own purposes as well as those of the United States and interested

in profit on its own account" (Clallam County v. United States, 263 U.S. 341, 345).20

D. Background and legislative history

We have attempted to show that, quite apart from the aid of the Atomic Energy Act's background and history, there is very good reason for construing the tax exemption clause of Section 9 (b) as applicable here. The statutory background and history seem to us to snap the lock securely.

For it is quite clear that (a) Congress was well aware of the important wartime role of atomic energy contractors, and it also knew that, if the Commission continued to use contractors as constructors or operators of its plants and facilities, the bulk of its expenditures would be for their reimbursement and payment; (b) throughout the Con-

²⁰ The use tax, which is involved in the two separate suits brought by Roane-Anderson and Carbide and Carbon Chemicals (supra, pp. 4, 5), also falls for the independent reason that it is imposed on "property " " of the Commission" which Section 9 (b) exempts from taxation along with the Commission's "activities". Materials and supplies bought by the Commission's operating contractors for use in the performance of their contracts belong to the Commission under the title provisions of the contracts. Supra, pp. 9-10, 12. Accordingly, they cannot be taxed directly and their "use" is likewise exempt from taxation since in practical operation and effect a tax on the use of property is equivalent to a tax on the property. Cf. United States v. Allegheny County, 322 U.S. 174, 177, 184-185, 186, 187-188. As we point out in the text of this section (supra, pp. 36-38), it is immaterial that the taxpayer may be the contractor, which does not own the property. It is the subject matter-"property of the Commission" -which is exempted.

gressional consideration of atomic energy legislation, the tax exemption clauses of the measures under review (the May-Johnson and McMahon bills) were designed to be broad enough to cover the mass of the Commission's expenditures for operation of its plants and facilities; and (c) when the McMahon bill, after first prohibiting the use of contractors as operators of the Commission's plants and requiring the Commission to operate them itself, was revised to permit the employment of contractors, the tax exemption clause of the bill (which had previously covered only the Commission itself and its income and property) was simultaneously expanded to cover "activities of the Commission", a term which had been generally used throughout the Congressional consideration as sufficiently broad to cover all of the Commission's functions, including those performed through contractors.

1. The wartime role of atomic energy operating contractors

Use of the services of operating contractors at the major atomic energy installations had been the practice of the Manhattan Engineer District during World War II. At Oak Ridge, the Carbide and Carbon Chemicals Corporation, Roane-Anderson Company, and Monsanto contracts were originally executed by the Manhattan District. At Hanford, in the State of Washington, the duPont

Company had served as operating contractor during the war, and in September 1946, was succeeded by General Electric Company. At Los Alamos, in New Mexico, the University of California had been the operating contractor for the weapons work from the very start of activities at that remote site. Similarly, the University of Chicago had been the operating contractor for the atomic energy activities centered in the Chicago area. Cf. R. in No. 186, at 9, 20-21; R. in No. 187, at 8, 19.

At Oak Ridge, respondent Carbide and Carbon Chemicals Corporation has operated the gaseous-diffusion production facilities since they were constructed. Respondent Roane-Anderson Company was formed for the purpose of managing and operating the town of Oak Ridge for the Manhattan District. Supra, pp. 7-12.

All these circumstances were well known to Congress when it had under consideration, in 1945 and 1946, the various proposals for atomic energy legislation. The Smyth Report, which was issued in August 1945, recounted the major role of university and industrial contractors in the development of atomic energy and the production of the atomic bomb under the Manhattan District. At the first hearings on atomic energy legislation, in October 1945, before the House Committee on Military Affairs, Secretary of War Patterson stressed the need for continuing the "well-integrated and

engineers, and skilled workers". Hearings before the Committee on Military Affairs, H. of Reps., on H. R. 4280, 79th Cong., 1st Sess., p. 7 (October 9, 1945). At the same hearing, General Groves, who had headed the Manhattan District, pointed out (p. 9): "The success of the Manhattan District Project would have been impossible without the support it received from colleges and universities. from large and small industrial corporations, and from the skill of American labor"; and "Our progress in the future atomic development will depend equally on the utilization of the fullest support that can be drawn from all of these sources".

At the more extensive Senate hearings beginning late in November 1945, testimony was prominently given by representatives of the operating contractors of the Manhattan District. Scientists from the several universities which had contributed to the project testified at length. Representatives of the General Electric Company, the Stone and Webster Engineering Company, the Union Carbide and Carbon Corporation, and the Carbide and Carbon Chemicals Corporation, also expounded the functions they had performed and the important role which the operating contractors had played in the wartime atomic energy program.²¹

²¹ Hearings before the Senate Special Committee on Atomic Energy, 79th Cong., 1st Sess., pursuant to S. Res. 179, Part 1,

2. The May-Johnson bills. The first measure to receive active consideration was the so-called May-Johnson bill, originally drafted under the supervision of an Interim Committee on Atomic Energy, appointed by Secretary of War Stimson with the approval of the President (Hearings before the House Committee on Military Affairs, supra, pp. 4-5; Hearings before the Senate Special Committee on S. 1717, supra, p. 390; H. Rep. No. 1186, 79th Cong., 1st Sess., p. 1).

H.R. 4280. The bill, which was introduced as H.R. 4280, proposed an Atomic Energy Commission and an Administrator with large powers. Of present significance are these three general aspects of the measure:

(a) the terms "activities" and "activities of the Commission" were used, frequently and broadly, to cover all the Commission's functions, no matter by whom performed (Section 3(a), Section 10(a), (b), (c), Section 13, Section 14, Section 16);²²

pp. 79-143, Part 3, pp. 407-447; Hearings before the Senate Special Committee on Atomic Energy, 79th Cong., 2d Sess., on S. 1717, Part 2, pp. 101-134, Part 3, pp. 281-296, 359-378.

ties, the Commission shall adopt the policy of minimum interference with private research and of employing other Government agencies, educational and research institutions, and private enterprise to the maximum extent consistent with the accomplishment of the objectives of this Act. The activities of the Commission shall be carried on in accordance with the basic principles established by the President in the promotion of international peace, the development of foreign policy, and the safeguarding of the national defense." Section 10(a) gave general authority to the Administrator, under the Commission's supervision, to carry out the performance of the

(b) the Commission and the Administrator were expressly authorized to use contractors in the performance of their respective functions (Section 3(a), Section 5(a)(1)(2), Section 10(a); see footnote 22, supra, p. 42);

(c) the Commission was granted the power to create corporations to carry out its functions (Section 5(a)(7)).

H. R. 4566: After public hearings (supra, pp. 40-41, 42) and executive consideration, the House Committee on Military Affairs requested its chairman to introduce a bill embodying the provisions of the original bill (H.R. 4280) as amended by the Committee. See H. Rep. No. 1186, 79th Cong., 1st Sess., p. 3. This revised version of the May-Johnson bill was H.R. 4566, which was reported to the House on November 5, 1945, in H. Rep. No. 1186, supra.

With respect to the three facets of H.R. 4280 discussed above (supra, pp. 42-43), H.R. 4566 ollowed the earlier version, except that the new bill made it even clearer that "activities of the Commission" included those functions performed through contractors, and that contractors might be used to perform Commission functions.

As before, the terms "activities" and "activities of the Commission" were used extensively in the

Commission's program, and authorized him, with the Commission's approval, to "arrange, by contract or otherwise, with other persons to engage in any of the foregoing activities on behalf of the Commission, and subject to its supervision." (Italies supplied).

broad sense (Section 3(a); Section 10(a), (b); Section 13; Section 14, Section 15). Section 10(a), which is significantly headed "Activities of Commission" (italics added), contains the major grant of power to the Commission and the main description of its functions: i.e., "research and experimentation" and the "development of any and all processes or methods for the release of atomic energy, and for the exploitation and use thereof for military, industrial, scientific, or medical purposes". As in H.R. 4280, the Commission is given express authority to "arrange" by contract or otherwise with other persons to engage in any of the foregoing activities on behalf of the Commission, and subject to its supervision" (italics supplied).

The House Committee's report made the following revealing comment on these provisions of Section 10(a), a comment which plainly shows that in the May-Johnson bills "activities of the Commission" included those functions performed through contractors (H. Rep. No. 1186, supra, pp. 11-12):

SECTION 10. ACTIVITIES OF COMMISSION

This section deals with the carrying on of the Commission's activities, either through its own employees or through operating agents or contractors.

Under subsection (a), the Commission and the Administrator (upon delegation from the Commission) are authorized to conduct research in the field of atomic energy, to develop processes for the release of such energy and for its use for military, industrial, scientific, and medical purposes, and to engage in necessary related activities. They may perform these functions through employees, or through contractors or other agents. The last-mentioned provision permits the Commission to continue, if it desires, the Manhattan engineer district's practice of using the services of management corporations for the operation on its behalf of Government plants in Tennessee, Washington, and elsewhere. For research, the policy shall be to utilize and encourage educational, research, and nonprofit institutions properly equipped and staffed.

ernment agency shall engage in such activities without the consent of the Commission or the Administrator and subject to the conditions imposed by the Commission, except that the armed forces may do so in time of war or national emergency if so directed by the President. [Italics supplied.]

The tax exemption clause in H.R. 4280 (Section 16) and H.R. 4566 (Section 15), which was the same in both, fitted in with this treatment of the contractor's work as an integral part of the Commission's activities:

The Commission and any corporation created by it, and the property and income of the Commission or of such corporations, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

Though this clause did not refer to "activities of the Commission"—as does Section 9(b) of the final Act—it is clear that it was intended to cover functions performed by contractors under Section 10(a), because both bills expressly characterized—"contractors with the Commission" as its agents, along with "corporations created by the Commission" "and other agents" (Section 20(g) of H.R. 4280; Section 19(g) of H.R. 4566). By this device, the express exemption of the Commission itself operated to exempt the contractor-agent.²³

May-Johnson bill, was never acted upon by the House of Representatives. The Senate Special Committee on Atomic Energy, which had been created in November 1945, to consider the general problem of the atomic bomb and of atomic energy legislation, focussed its attention on another measure, S. 1717, known as the McMahon bill, which was introduced by the Senator from Connecticut on December 20, 1945. This was the bill which became the Atomic-Energy Act of 1946, after extensive revisions.

(a). As originally introduced, S. 1717 differed from the May-Johnson bills on the first two of the three aspects discussed above, (*supra*, pp. 42-43) (*i.e.*; Commission "activities", use of contractors,

²³ Both bills also contained a provision for payment-in-lieuof-taxes which is almost identical with that now contained in Section 9 (b) of the Act (H.R. 4280, Section 16; H.R. 4566, Section 15).

creation of Commission corporations).²⁴ The Senate measure was framed in different terms, and did not make use of the phrase "activities of the Commission", except in the section (Section 8(b)) dealing with payments-in-lieu-of-taxes and tax exemption which was identical with that in the May bills (see footnote 23, and supra, pp. 45-46), and in the section on reports to Congress (Section 13) which also appears to have been modelled on a similar report provision in the May bills.

But of larger importance for the present inquiry is the provision of the original McMahon bill requiring the Commission to produce its fissionable ' materials in its own plants by its own employees. It was expressly directed to terminate, "as rapidly as practicable, and in any event not more than one year after the effective date of this Act", all contracts previously made for the production of fissionable materials (Section 4(b), (e)) Moreover, there was no specific provision anywhere in the bill for the use of cost type contractors in the performance of any other of the Commission's function, except research and development activities. This of course, was radically different from the May-Johnson bills which were premised on the assumption that the new/Commission could elect to continue the Manhattan Discrict's practice of employing contractors to operate its plants and to perform other of its important functions.

²⁴ S. 1717, as originally introduced, is reprinted in the Hearings before the Senaté Special Committee on Atomic Energy on S. 1717, supra, pp. 1-9.

As noted above, the payments-in-lieu-of-taxes and the tax exemption provisions of the original S. 1717 (Section 8(b)) were identical with those in the May-Johnson bills, including the reference to Commission-created corporations. See Hearings before the Senate Special Committee on Atomic Energy on S. 1717, supra, at p. 5. Since the Commission could not employ operating contractors for its plants and its functions were mainly to be performed directly or through its own corporations, the question of whether a cost-plus contractor's purchase transactions were tax exempt under this provision was obviously of minor importance. Exemption of the Commission and its corporations was sufficient.

(b). The War Department report on S. 1717 strongly urged the elimination of the provision requiring the Commission to operate its plants through its own employees and prohibiting the use of contractors. It was pointed out that the experience of the Manhattan District had been that the services of skilled industrial and operating concerns might be essential to efficient production. Others made similar suggestions publicly and, undoubtedly, also privately. See Hearings before the Senate Special Committee on Atomic Energy on

²⁵ S. 1717 omitted the statutory characterization of contractors as "agents" of the Commission which had appeared in the May-Johnson bills. See supra, p. 46.

This report is referred in Hearings before the Senate Special Committee on Atomic Energy on S. 1717, supra, at/pp. 408, 409.

S. 1717, supra, at 298, 304; Sen. Rep. No. 1211 (on 1717), 79th Cong., 2d Sess., p. 7.

During the course of the Senate Special Committee's consideration of S. 1717, this suggestion was accepted and the prohibition on the employment of contractors was abandoned. Confidential Committee Print No. 4, dated March 27, 1946, removed the prohibition and expressly authorized the use of contractors. In terms substantially identical with Section 4(c)(2) of the Act (infra, pp. 61-62), Section 4(c)(2) of Committee Print No. 4 provided:

The Commission is authorized and directed to produce or to provide for the production of fissionable material in its own facilities. the extent deemed necessary, the Commission is authorized to make, or to continue in effect with or without modification,27 contracts with persons obligating them to produce fissionable material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident to the conduct of research and development activities under such contracts.

In explaining this provision of the bill, the Sen-

²⁷ The italicized words are omitted from Section 4(c) (2) as enacted,

ate Report on S. 1717 said (S. Rep. No. 1211, 79th Cong., 2d Sess., p. 15):

Wherever possible the Committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. Thus, the bill permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and experience of American industry. [Italics supplied.]

(c). At the same time that it made this major bange in the powers of the Commission and the manner in which its activities were to be carried on, the Senate Committee (as revealed by its Committee Print No. 4) made another significant change: revision of the tax exemption clause of Section 9(b) of the bill to insert "activities of the Commission" and to omit the reference to the Commission's corporations 28—making the clause read precisely as it now does.

In our view, the word "activities" was inserted in the tax exemption clause of Section 9(b) to make sure that that provision accorded fully with the newly accepted authorization to the Commission to employ contractors. From the experience of the Manhattan District, the Senate knew that if the Commission continued the practice of using oper-

²⁸ The elimination of the power to create corporations had been suggested by Harold Smith, then Director of the Bureau of the Budget (see Hearings before the Senate Special Committee on Atomic Energy on S. 1717, at p. 38), and this had been accomplished a week or so earlier in the previous version of the bill.

ating contractors the bulk of the Commission's expenditures would undoubtedly consist of reimbursement of, and payment to, these contractors. See *supra*, pp. 39-41. To have any real effect on the Commission's fiscal affairs, the exemption would have to be available to these contractors and cover the transactions which occurred in the performance of their contracts. Hence, the need to make sure that the clause was broad enough to cover the new authorization.

We suggest that the Senate Committee used the words "activities * * * of the Commission" for this very purpose because that term, as we have shown (supra, pp. 42-45) had been clearly used in the broad sense in the May-Johnson bills and, particularly, because it had the same wide scope in the payments-in-lieu-of-taxes provision which immediately preceded the tax exemption clause in Section 9 (b) and which had likewise been taken over from the May-Johnson bills. Supra, pp. 47, 48. Indeed, the same term "activities of the Commission" had previously been used in the broad sense by the Senate Committee itself, in providing for a Joint Committee on Atomic Energy (first appearing in Confidential Committee Print No. 2. dated March 9, 1946, Section 14)—the provision which became Section 15 of the Act (supra, p. 35).20

We have already noted that the term had the same broad meaning in the Reports section of the original S. 1717 (Section 13), which ultimately became Section 17 of the Act. Supra, pp. 35, 47.

We have shown above (supra, pp. 25-38) that on the face of the statute the term "activities of the Commission" should be given the meaning the Supreme Court of Tennessee attributed to it. We submit that the legislative history we have been detailing affirmatively proves that this is just what Congress desired and intended. Exemption of "activities of the Commission" was added to the tax exemption clause of Section 9(b) in order to cover those Commission functions performed through contractors.

4. Summary. At all stages of the Congressional consideration of atomic energy legislation, the tax exemption provision, was sufficiently broad to exempt the great bulk of the Commission's operation from state sales and use taxes. From the history of the Manhattan District, Congress was aware that the mass of the Commission's expenditures would probably flow from the construction and operation of its plants and facilities. -Under the May-Johnson bills (H.R. 4280, H.R. 4566), which permitted the employment of operating contractors, the wide exemption was secured by characterizing the contractors as the Commission's agents and thus exempting their purchase and use transactions through the tax exemption accorded the Commission itself. Supra, pp. 45-46. Under the original McMahon bill (S. 1717), which prohibited the Commission from using contractors to operate its production plants, a broad exemption,

in the practical sense, was also certain because the Commission's own employees would perform most of its functions and the tax exemption clause plainly covered all taxes imposed on the Commission itself. Supra, p. 48. And under the revised S. 1717, which became the Atomic Energy Act and authorized the employment of contractors. a tax exemption of the same wide scope was obtained by barring not only taxes levied directly. on the Commission itself but also taxes imposed on the "activities of the Commission"-a phrase. which the history of the legislation shows was used . throughout the consideration of the May-Johnson and McMahon bills as of sufficient scope to cover all of the Commission's functions, including those performed through contractors or agents. Supra, pp. 42-45, 46-47, 50-51.

E. The Nature of the Tennessee Tag

1. Petitioner appears to contend that the Tennessee sales tax is a tax on the vendor, not the vendee, and for that reason Section 9 (b) cannot apply here even though it might exempt the contractor-purchaser from a similar sales tax if it were described as laid upon the vendee. Pet. in No. 186, at 40-42; Pet. in No. 187, at 38-41. But if, as we have urged, the exemption clause of Section 9 (b) is broad enough to cover sales taxes paid initially by the contractor and ultimately by the Commission, then it should make no difference

whether the State tax be formally denominated a vendor or a vendee tax.30 The Tennessee statute expressly requires that the vendor must collect the tax from the purchaser at the time of making the sale and must add the tax to the price of the article. The tax is a debt from purchaser to seller until paid. Chap. 3, Public Acts 1947, section 4 and section 5 (a), (b) (infra, p. 67). Failure to collect the tax from the purchaser is made a misdemeanor (Section 5 (d), infra, p. 68). It is unlawful for a vendor "to advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax", and a violation of this provision is a misdemeanor (Section 5 (e), infra, p. 68).

In these circumstances, where it is evident that under the state law the sales tax must be paid by the Commission's contractor, the exemption accorded by Section 9 (b) cannot vary with the technical incidence of the tax on the contractor-

The distinction between vendor and vendee taxes obviously plays no part in connection with the use tax which is admittedly imposed on the users, which are the Commission contractors Roane-Anderson and Carbide and Carbon Chemicals. Supra, pp. 4, 5. However, a similar formal distinction between a tax on the property and one on the "use" of the property may be thought to be present. For the same reasons as those given in the text with respect to vendor and vendee sales taxes, we believe that the formal difference between a tax on "use" and one on the property itself is immaterial in applying the prohibition in Section 9 (b) against taxation of the "property of the Commission". See fn. 20, supra, p. 38.

vendee or the merchant-vendor. As we have shown (supra, pp. 21-53), that exemption was neither conceived nor couched in terms of formal legal incidence and it would subvert both its sweeping aim and its broad wording to make it depend on a distinction in label which is economically non-existent. See New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 673, 674, 675, discussed supra, pp. 23-24; Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 84.

2. In any event, the Tennessee statute imposes a legal obligation on the purchaser to pay the tax, and therefore must be called a vendee tax. The tax provisions sketched above show that the Tennessee legislature did not trust to the uncertain operation of economic forces to shift the tax to the purchaser. It did not leave the seller free to meet his sales tax obligation as he chose. It did not even rest content with a hortatory encourgagement to the seller to pass the tax on to his buyer. It imposed this duty on him by law, and made it a penal offense for the seller to absorb the tax or, indeed, even to advertise that he would do so. Accordingly, it seems plain enough that the tax is by law paid by the purchaser, and that the seller's only

The State Supreme Court appears to have considered the difference between the two types of taxes immaterial in this case. Its opinion barely refers to the incidence of the state tax and stresses the breadth of the exemption in Section 9 (b). See R. in No. 186, at 7. 19 ff; R. in No. 187, at 6, 18 ff. See also, Madison Suburban Utility Dist. v. Carson, 191 Tenn. 300 (1950), discussed infra, pp. 56-57.

function is that of tax collector for the state. The statute may call the seller the taxpayer but it places the legal incidence of the tax inescapably upon the purchaser.

The Tenressee Supreme Court has itself taken the view that the purchaser's status is determinative, at least where, as here, the purchaser is exempt from such taxation. It is true that, in upholding the validity of the sales tax, it remarked that the tax was a privilege tax upon the seller (Hooten v. Carson, 186 Tenn. 282, 287, 288 (1948)), but in the same connection it referred to the mandatory passing-on nequirements of the statute and quoted from, and relied on, a sales tax opinion of the Supreme Court of Alabama, which, as this Court has noted, holds that its comparable sales tax law imposes a legal obligation on the purchaser to pay the tax. Alabama v. King & Boozer, 314

Whatever may be the meaning of Hooten v. Carson, supra, the court below held, in a later opinion, that a purchaser who is exempt from taxation need not pay the sales tax, and thus appears to have determined either that (a) the tax is upon the purchaser, or (b) even though the legal incidence of the tax is upon the seller, a tax exemption available to the purchaser bars imposition of the tax. In Madison Suburban Utility District v. Carson, 191 Tenn. 300, 303, 307-309, the court held that a statute exempting the Utility

District's "property and revenue" from "all state, county and municipal taxation" exempted the district from the identical sales and use taxation which is involved here. It was held that "since the tax must be determined by its practical effect and operation rather than by particular descriptive language applied to it, the Sales Tax and Use Tax applied by the appellee herein must be held to be nothing more than a direct tax on the revenue of the appellant which is free from taxation under the Act by which the appellant was incorporated". 191 Tenn., at 307-308.

If follows that if, as a matter of federal law, Section 9 (b) applies to taxes initially paid by a contractor on its purchases, Tennessee law does not stand in the way. Either the tax is viewed by the state court as imposing a legal obligation on the purchaser which, of course, cannot be done where the purchaser is exempt. Or under the state law the legal incidence of a tax does not furnish the test for the applicability of that tax where an exemption or immunity from taxation is involved. Under both views, the tax is inapplicable as a matter of state law.³²

¹ are Petitioner's Rules and Regulations Promulgated in Connection with the Tennessee Retailers' Sales Tax take the position that where the United States is involved the tax cannot be collected. Rule 58 provides:

In any case where construction material or other tangible personal property is billed and sold directly to, and is paid for by the government of the United States, its departments or agencies, the State of Tennessee is with-

3. Finally, we may note that this Court is not controlled by the characterizations or conclusions of the state court, and can decide for itself the true incidence and impact of the tax, if that be deemed relevant in the application of Section 9 (b). Wisconsin v. J. C. Penney Co., 311 U.S. 435, 443; United States v. Allegheny County, 332 U.S. 174, 184; Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 84; New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665 674. The terms and structure of the Tennessee act (supra, pp. 54, 55-56) require the conclusion that its sales tax, like those of Alabama and North Dakota,33 imposes a legal obligation on the buyer to pay the tax, which the seller is compelled to add to his sales price and to collect. Cf. McGoldrick v. Berwind-White Co., 309 U.S. 33, 43 (City of New York sales tax); Colorado National Bank of. Denver v. Bedford, 310 U.S. 41, 51, 52 (Colorado bank service tax).

out power to impose the tax on such transactions. The determining factor in all cases is whether or not a sale of tangible personal property is made and billed directly to the Federal Government, its departments or agencies, and is paid for directly by the Federal Government. [Italics supplied.]

³³ See Alabama v. King & Boozer, 314 U.S. 1, 7; Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 98-9.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the Supreme Court of Tennessee should be affirmed.

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DECEMBER 1951.

APPENDIX A

1. The Atomic Energy Act of 1946, c. 724, 60 Stat. 755, 42 U.S.C. 1801, provides in pertinent part:

SECTION 1.

(b) Purpose of Act.—It is the purpose of this Act to effectuate the policies set out in section 1 (a) by providing, among others, for the following major programs relating to atomic energy:

(1) A program of assisting and fostering private research and development to en-

courage maximum scientific progress;

____(2) A program for the control of scientific and technical information which will permit the dissemination of such information to encourage scientific progress, and for the sharing on a reciprocal basis of information concerning the practical industrial application of atomic energy as soon as effective and enforceable safeguards against its use for destructive purposes can be devised;

(3) A program of federally conducted research and development to assure the Government of adequate scientific and technical ac-

complishment;

(4) A program for Government control of the production, ownership, and use of fissionable material to assure the common defense and security and to insure the broadest possible exploitation of the fields; and

,. (5) A program of administration which will be consistent with the foregoing policies

and with international arrangements made by the United States, and which will enable the Congress to be currently informed so as to take further legislative action as may hereafter be appropriate.

SEC. 4. * *

- (b) Prohibition.—It shall be unlawful for any person to own any facilities for the production of fissionable material or for any person to produce fissionable material, except to the extent authorized by subsection (c).
- (c) OWNERSHIP AND OPERATION OF PRODUC-
- (1) Ownership of Production Facilities.—The Commission, as agent of and on behalf of the United States, shall be the exclusive owner of all facilities for the production of fissionable material other than facilities which (A) are useful in the conduct of research and development activities in the fields specified in section 3, and (B) do not, in the opinion of the Commission, have a potential production rate adequate to enable the operator of such facilities to produce within a reasonable period of time a sufficient quantity of fissionable material to produce an atomic bomb or any other atomic weapon.
- (2) OPERATION OF THE COMMISSION'S PRODUCTION FACILITIES.—The Commission is authorized and directed to produce or to provide for the production of fissionable material in its

own facilities. To the extent deemed necessary, the Commission is authorized to make, or to continue in effect, contracts with persons obligating them to produce fissionable material in facilities owned by the Commission. The Commission is also authorized to enter into research and development contracts authorizing the contractor to produce fissionable material in facilities owned by the Commission to the extent that the production of such fissionable material may be incident to the conduct of research and development activities under such Any contract entered into under this section shall contain provisions (A) prohibiting the contrator with the Commission from subcontracting any part of the work he. is obligated to perform under the contract, except as authorized by the Commission, and (B) obligating the contractor to make such reports to the Commission as it may deem appropriate with respect to his activities under the contract, to submit to frequent inspection by employees of the Commission of all such activities, and to comply with all safety and security regulations which may be prescribed by the Commission. Any contract made under the provisions of this paragraph may be made without regard to the provisions of Section 3709 of the Revised Statutes (U.S.C., title 41, sec. 5) upon certification by the Commission that such action is necessary in the interest of the common defense and security, or upon a showing that advertising is not reasonably practicable, and partial and advance payments may be made under such contracts. The President

shall determine at least once each year the quantities of fissionable material to be pro-

duced under this paragraph.

(3) OPERATION OF OTHER PRODUCTION FACILITIES.—Fissionable material may be produced in the conduct of research and development activities in facilities which, under paragraph (1) above, are not required to be owned by the Commission.

- SEC. 9. (a) The President shall direct the transfer to the Commission of all interests when by the United States or any Government agency in the following property:
- weapons and parts thereof; all facilities, equipment, and materials for the processing, production, or utilization of fissionable material or atomic energy; all processes and technical information of any kind, and the source thereof (including data, drawings, specifications, patents, patent applications, and other sources (relating to the processing, production, or utilization of fissionable material or atomic energy; and all contracts, agreements, leases, patents, applications for patents, inventions and discoveries (whether patented or unpatented), and other rights of any kind concerning any such items;

(2) All facilities, equipment, and materials, devoted primarily to atomic energy research

and development; and

(3) Such other property owned by or in the custody or control of the Manhattan Engineer

District or other Government agencies as the President may determine.

(b) In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired; except in cases where special burdens have been east upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof.

SEC. 12. (a) In the performance of its functions the Commission is authorized to—

(5) acquire such materials, property, equipment, and facilities, establish or construct such buildings and facilities and modify such buildings and facilities from time to time as it may deem necessary, and construct, acquire, provide, or arrange for such facilities and services (at project sites where such facilities and services are not available) for the housing, health, safety, welfare, and recreation of personnel employed by the Commission as it may deem necessary;

SEC. 15. (a) There is hereby established a Joint Committee on Atomic Energy to be composed on nine Members of the Senate to be appointed by the President of the Senate, and nine Members of the House of Representatives to be appointed by the Speaker of the House of Representatives. In each instance not more than five members shall be members of the same political party.

(b) The joint committee shall make continuing studies of the activities of the Atomic Energy Commission and of problems relating to the development, use, and control of atomic energy. The Commission shall keep the joint committee fully and currently informed with respect to the Commission's activities. All bills, resolutions, and other matters in the Senate or the House of Representatives relating primarily to the Commission or to the development, use, or control of atomic energy shall be referred to the joint committee. The members of the joint committee who are Members of the

Senate shall from time to time report to the Senate, and the members of the joint committee who are Members of the House of Representatives shall from time to time report to the House, by bill or otherwise, their recommendations with respect to matters within the jurisdiction of their respective Houses which are (1) referred to the joint committee or (2) otherwise within the jurisdiction of the joint committee.

SEC. 17. The Commission shall submit to the Congress, in January and July of each year, a report concerning the activities of the Commission. The Commission shall include in such report, and shall at such other times as it deems desirable submit to the Congress, such recommendations for additional legislation as the Commission deems necessary or desirable.

2. The Tennessee Retailers' Sales Tax Act, chap.
No. 3, Public Acts of 1947, provides in pertinent
part:

SEC. 3. Be it further enacted, That it is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this State, or who rents or furnishes any of the things or services taxable under this Act, or who stores for use or consumption in this State any item

or article of tangible personal property as defined herein and who leases or rents such property within the State of Tennessee. For the exercise of said privilege, a tax is levied as follows:

SEC. 4. *

Every "dealer" making sales, whether within or outside the State, of tangible personal property, for distribution, storage, use, or other consumption, in this State, shall at the time of making sales, collect the tax imposed by this Act from the purchaser.

SEC. 5. Be It Further Enacted, That:

- (a) The privilege tax herein levied, measured by retail sales shall be collected by the dealer from the purchaser or consumer.
- (b) Dealers shall, as far as practicable, add the amounts of the tax imposed under this Act to the sales price or charge, which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Any dealer who shall neglect, fail, or refuse to collect the tax herein provided, upon any, every, and all retail sales made by him, or his agents, or employees or tangible personal property which is subject to the tax imposed by this Act, shall be liable for and pay the tax himself.
- (c) When the tax collected for any period is in excess of two per cent (2%) the total tax

collected must be paid over to the Commissioner, less the compensation to be allowed the dealer as hereinafter set forth. This provision shall be construed with other provisions of this Act and given effect so as to result in the payment to the Commissioner of the total tax collected if in excess of two per cent (2%).

- (d) Any dealer who shall fail, neglect, or refuse to collect the tax herein provided, either by himself or through his agents or employees, shall, in addition to the penalty of being liable for and paying the tax himself, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than One Hundred (\$100.00) Dollars or imprisonment in the County jail for not more than three months, or both, in the discretion of the Court.
- (e) A person engaged in any business taxable under this Act shall not advertise or hold out to the public, in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the purchaser of the payment of all or any part of the tax. A person who violates this provision with respect to advertising shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Twenty-five (\$25.00), nor more than Two Hundred Fifty (\$250.00) Dollars, or imprisonment in the County Jail for not exceeding three months, or both, in the discretion of the court. For a second or subsequent offense the penalty shall be double.

APPENDIX B

.United States Atomic Energy Commission Washington 25, D. C.

December 26, 1951.

Dear Mr. Solicitor General:

In connection with the Tennessee sales and use tax cases involving cost type contractors of the Atomic Energy Commission which are now pending in the United States Supreme Court, representatives of your office have asked for estimates of the amount of sales and use taxes and business and occupation taxes now in dispute in the various states where the Commission has installations, together with an estimate of the current rate of accrual of such taxes. We do not have accurate figures on the amount of taxes in dispute. However, the following order of magnitude estimates involving cost type contractors of the At mic Energy Commission may be useful for the purposes of the Department of Justice:

ESTIMATED AMOUNTS NOW IN DISPUTE

Tennessee	
Sales and Use Tax	
Paid and in dispute	\$ 3,000,000
* Washington	The state of the s
Business and Occupation Tax	
Paid and in dispute	1,475,000
Use Tax	
Not paid but in dispute	350,000
New Mexico	
Sales and Use Tax	
Not paid but in dispute	56,000

	A REAL PROPERTY AND ADDRESS OF THE PARTY AND A
California	(4)
Sales and Use Tax	
Not paid but in dispute	125,000
Indiana ?	
Gross income tax	
Paid and in dispute	500,000
Estimated Total Amount in Dispute	\$ 5,506,000
ESTIMATED CURRENT ANNUAL ACCRUA	L RATE
Tennessee	
Sales and Use Tax	
Estimate per year	1,390,000
Washington	
Business and Occupation Tax	
Estimate per year	265,000
Use Tax	
Estimate per year	90,000
New Mexico	
(Currently exempt by administra-	
tive interpretation since contrac-	1
tors now operate with advance of	d
Federal funds)	0.
California .	
Sales and Use Tax	
Estimate per year	20,000
Indiana .	
Gross Income Tax	. 2
Estimate per year (after Jan. 1,	
1952)	550,000
South Carolina	
Sales and Use Tax	
Estimate per year (after Jan. 1,	
1952)	3,000,000
Estimated Total Annual Tax	5,315,000
	20

Tax problems involving cost type contractors exist also in several other states but the amount involved does not appear to be large at the present time.

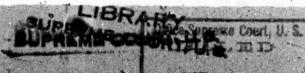
All of the foregoing estimates relate to taxes in controversy since January 1, 1947, the effective a date of the Atomic Energy Act. It should also be noted that in many states, these types of taxes are exempt by administrative interpretation of the state laws. If those state laws or the interpretation thereof should be modified, the amount of taxes involved would be substantial.

In addition to the foregoing, the state of Tennessee has claimed various taxes against cost type contractors for the period prior to 1947 including gross receipt taxes on distribution of water and electricity and on bus transportation, bus seat taxes, gasoline taxes and motor vehicle license taxes. Claims for such taxes for the year 1947 to date are contingent upon pending litigation and if asserted will probably average around one-half million dollars per year.

Sincerely yours, ·

(Sgd.) EVERETT L. HOLLIS, General Counsel.

Honorable Philip B. Perlman, The Solicitor General.



OCT 1 1951

CHARLES ELMORE GROPLEY

In the

Supreme Court of the United States

October Term, 1951

Nos. 186 old 187

SAM K. CARSON, Commissioner of Finance and Taxation

for the State of Tennessee, Petitioner,

ROANE-ANDERSON COMPANY, ET AL.

and

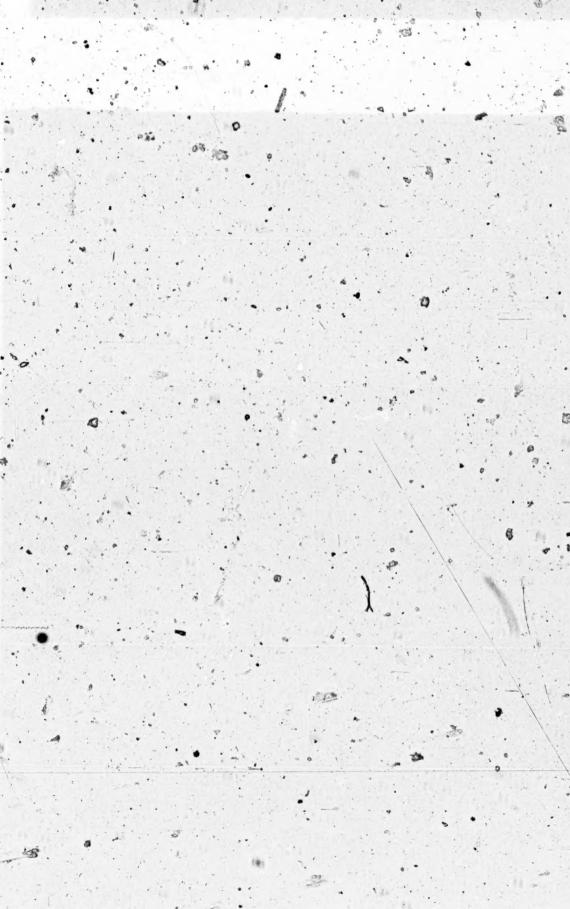
SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,

CARBIDE AND CARBON CHEMICAL CORPORATION, ET AL.
Respondents

BRIEF OF THE STATE OF GEORGIA AMICUS CURIAE

EUGENE COOK,
Attorney General of Georgia
M. H. BLACKSHEAR, JR.,
Deputy Assistant Attorney
General of Georgia
GEORGE E. SIMS, JR.,
Assistant Attorney General
of Georgia

ROBERT H. GAMBRELL. Assistant Attorney General of Georgia



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Supreme Court of the United States

October Term, 1951

Nos. 186 and 187

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,

ROANE-ANDERSON COMPANY, ET AL. Respondents

and

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee,
Petitioner,

CARBIDE AND CARBON CHEMICAL CORPORATION ET AL.
Respondents

BRIEF OF THE STATE OF GEORGIA AMICUS CURIAE

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

The State of Georgia by its Attorney General and pursuant to Rule 27-9(d) of this Court, files this brief in support of a petition for the writ of certiorari to the Supreme Court of the State of Tennessee, filed in this Court by Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee.

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

These cases were consolidated for trial in the Chan-

cery Court for Davidson County, Nashville, Tennessee, and but one opinion was rendered disposing of the consolidated cases (No. 186R.50, No. 187R.47). This opinion is not reported. Three opinions were filed by the Supreme Court of Tennessee: a majority opinion (No. 186R.7; No. 187R.5) a concurring opinion (No. 186R.24; No. 187R.23) and a dissenting opinion (No. 186R.26; No. 187R.25), the latter being filed by two of the five Justices who comprise that court. These opinions are reported in 239 S.W. (2d) 27.

STATEMENT OF JURISDICTION

The State of Georgia adopts the statement of jurisdiction as made in the brief for petitioner.

In addition, the State of Georgia respectfully insists that the Supreme Court of Tennessee has held that but for the language of Section 9(b) of the Atomic Energy Act of 1946, the independent contractor respondents are liable for the taxes imposed by the Tennessee Sales and Use Tax Act and that the Supreme Court of Tennessee has improperly interpreted said Section 9(b) of the Atomic Energy Act of 1946, Therefore, by resting its decision squarely upon this interpretation of a Federal statute, a Federal question of substance has been raised not heretofore decided by this Court. Reconstruction Finance Corporation v. County of Beaver, Pennsylvania, 328 U. S. 204, 208.

The question presented is of much national interest and should be inquired into by this Honorable Court. A determination by this Court will avoid confusion in many jurisdictions and the resulting decisions necessary which may well be the reverse of the Tennessee decision of which the State of Georgia here complains.

INTEREST OF THE AMICUS CURIAE

- 1. The General Assembly of the State of Georgia enacted a "Retailers' and Consumers' Sales and Use Tax Act," Georgia Laws, 1951, page 360, substantially the same as the act which imposes the taxes here involved except that the Tennessee Act levies the sales tax upon the vendor and the Georgia Act levies the sales tax upon the consumer. The difference is not thought to be material to the issues here as to the respondents Roane-Anderson Company and Carbide and Carbon Chemical Corporation.
- 2. The Atomic Energy Commission is in the process of constructing a huge installation in the vicinity of Ellington, South Carolina, popularly known as the Savannah River Project. The Operations Office for this project was located in Augusta, Georgia.
- 3. The Atomic Energy Commission has entered into a cost-plus-fixed-fee contract with E. I. duPont de Nemours and Company which authorizes an initial expenditure of one hundred million dollars (\$100,-000,000.00). Some of this sum will be spent in the State of Georgia by this independent contractor and a proper interpretation of Section 9(b) of the Atomic Energy Act of 1946 will determine, in large part, the taxability of purchases made in Georgia by the duPont Company.

STATEMENT OF THE CASE

The State of Georgia adopts the statement of the case as made in the brief for petitioner.

ISSUES INVOLVED

The questions presented by the petitioner together -

with petitioner's reasons for granting the writ of ce tiorari may be summarized as follows:

1. Does Section 9(b) of the Atomic Energy A of 1946, 42 U.S.C.A., 1951 Supplement, Section 1809(b), exempt from State sales and use taxation the purchase and use of tangible personal proper by independent contractors of the Atomic Energy Commission as "activities" of the Commission itself.

ARGUMENT AND CITATION OF AUTHORITY

1. Respondents are independent contractors are therefore the doctrine of implied constitutional immurity is not applicable.

The Courts of the State of Tennessee upon a stude of the contracts of the respondents, Roane-Anderso Company and Carbide and Carbon Chemical Corporation, and a finding of facts determined that sale respondents were independent contractors. (No. 18 R.16; No. 187R.14,15) The State of Georgia considers binding this application of State law to the fact in both the majority opinion complained of and the dissent (No. 186R.26; No. 187R.25) in respect this question. Reconstruction Finance Corporation County of Beaver, Pennsylvania, 328 U. S. 204, 208

Since the respondents are independent contractor the doctrine of implied constitutional immunity is no applicable. James v. Dravo Contracting Compan 302 U.S. 134, State of Alabama v. King and Booze 314 U.S. 1, and Curry v. United States, 314 U.S. 1

In State of Alabama v. King and Boozer, supra, th Court said:

"They were not relieved of the liability to pe the tax either because the contractors in a loos and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors." (Emphasis supplied.)

This Court has also said:

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, . . ." (Emphasis supplied.) Penn Dairies v. Milk Control Commission of the Commonwealth of Pennsylvania, 318 U.S. 261, 270, 271.

2. Any tax exemption claimed or enjoyed by respondents must stem from express Congressional grant.

The State of Georgia believes that the majority opinion rendered by the Supreme Court of Tennessee properly states the question to be determined as: "Did the Congress of the United States enact appropriate legislation to immunize the [independent] contractors involved in the instant case?" (No. 186R.18,

19; No. 187R.17) That it is possible for the Congress to enact such legislation is not here questioned.

In Alabama v. King and Boozer, supra, this Court said:

"Congress has declined to pass legislation immunizing from State taxation, contractors under 'cost-plus' contracts for the construction of governmental projects."

The Congress has considered such tax immunizing legislation and has refused to enact it. Citation in Footnote 1, Alabama v. King and Boozer, supra.

The will of the Legislature is to be discovered as well by what the Legislature has not declared as by what they have expressed. Houston v, Moore, 5 Wheat. 1, 21. It is urged that since Congress can supply the proper words if such is its intention, the fact that they are not supplied leaves only the conclusion that such was not intended.

In speaking of what is to be gained by inferences from silence or lack of express terms in a statute, this Court in *Bates v. Brown*, 5 Wall. 710, 718, said:

"If the legislature had designed to provide for this case, according to the rule insisted upon, we cannot doubt that they would have said so in express terms. The statute bears no marks of haste or inattention. We cannot believe it was intended to leave a rule of the common law so well known, and so important, to be deduced and established only by the doubtful results of discussion and inference. The draughtsman of the bill could not have overlooked it, and the silence of the statute is full of meaning."

This Court has also enunciated the principle that

the silence of Congress when it has authority to speak may sometimes give rise to an implication as to the Congressional purpose; and the nature and extent of that implication depends upon the nature of the Congressional power and the effect of its exercise. Graves v. New York ex rel. O'Keefe, 306 U. S. 466. It is earnestly contended that the Congress having the power to immunize these independent contractors and not doing so in clear and unequivocal language indicates beyond question that it has not chosen to do so.

It is a well understood principle of construction that in the absence of a definition of a statutory word by the Legislature, the etymology of the word must be considered and its ordinary meaning applied. *United States v. Lombardo*, 241 U. S. 73, 76. We know of no common or legal definition of "activities" such as the connotation or meaning given the word by the effect of the ruling of the Supreme Court of Tennessee.

In Oklahoma Tax Commission v. Texas Company, 336 U. S. 342, 366, this Court said:

"But Congress has not created an immunity here by affirmative action, and 'The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.' Oklahoma Tax Commission v. United States, 319 U. S. 598, 604, ... '... if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.'"

We respectfully call to the Court's attention to two old and time-honored maxims that taxation is the rule and exemption the exception and tax exemptions must be strictly construed. Smith v. Davis, 323 U. S. 11,

117, The Yazoo and Mississippi Valley Railroad Company v. Thomas, 132 U.S. 174, 185.

In order to keep the question which is before the Court more clearly in focus, it is respectfully submitted that the question here does not involve a cession by the State of Tennessee of its taxing jurisdiction, either through delegated powers in the Constitution of the United States, Graves v. New York, ex rel. O'Keefe, supra; United States v. County of Allegheny, 322 U.S. 174, or by special grant of the State of Tennessee to the Federal Government, nor by a withholding of taxing jurisdiction by an Act of Congress, Federal Land Bank v. Crosland, 271 U.S. 374; Pittman v. Home Owners Loan Corporation, 308 U.S. 21; Federal Land Bank v. Bismark Lumber Company, 314 U.S. 95.

As will be shown below, the incidence of taxation is outside that ceded by the State of Tennessee to the Federal Government, either through the delegated powers of the Constitution of the United States, Oklahoma Tax Commission v. Texas Company, supra, or by special grant of the State of Tennessee to the Federal Government, Wilson v. Cook, 327 U. S. 474; S. R. A., Inc., v. Minnesota, 327 U. S. 558, nor has the incidence of taxation been withheld by an Act of Congress, Reconstruction Finance Corporation v. County of Beaver, Pennsylvania, supra.

3. Does Section 9(b) of the Atomic Energy Act of 1946 exempt from State sales and use taxation the purchase and use of tangible personal property by independent contractors of the Atomic Energy Commission?

Section 9(b) of the Atomic Energy Act of 1946 provides:

"(b) In order to render financial assistance

to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission. deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been case upon the State or local government by activities of the Commission, the Manhattan Engineer District of their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment. The Commission, and the property, activities, and income of the Commission are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof. Aug 1, 1946, c. 724, Sec. 9, 60 Stat. 765."

As pointed out by the Supreme Court of Tennessee in the majority opinion:

"Obviously, the question presented is whether the purchase and use of materials and supplies by cost type contractors of the Atomic Energy Commission in the performance of their contracts are part of the 'activities—of the Commission' within the intendment of the provision just quoted and are thereby exempted from taxation by any state, county or subdivision thereof 'in any manner or form.'" (No. 186R.19; No. 187R.18)

The State of Georgia believes the Supreme Court of Tennessee correctly states that the word "activities" has a broad meaning "because the term within itself evould cover anything that the Commission was undertaking to do." (No. 186R.20; No. 187R.19) (Emphasis supplied.) But the conclusion of the Court is not consistent with this language, for the contractor's acts are not the acts of the Commission.

(a) A statute which is clear and unambiguous is not open to construction or interpretation.

When the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to statute interpretation.

In Lake County v. Rollins, 130 U. S. 662, 670, Mr. Justice Lamar expressed this principle of construction with force and clarity as follows:

"To get at the thought and meaning in a statute, a contract or a constitution, the first resort in all cases is to the natural significance of the words, and the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then the meaning apparent on the face of the instrument must be accepted and neither the courts nor the legislature have a right to add to it or take from it."

It has long been an established rule that a plain and unambiguous statute is to be applied and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity, 50 Am. Jur. Statutes, Section 225.

(b) "Activities" of the Atomic Energy Commission are to produce or provide for the production of atomic energy.

A review of the Atomic Energy Act of 1946 indicates that the purpose for which the Commission was created and the activities in which it is authorized to engage are activities for the research and development of atomic energy, to assist private or public agencies in the research or development of atomic energy, to provide for the ownership by the Atomic Energy Com-. mission of all facilities and materials needed in the proper conduct of its authorized activities, to control the production of fissionable material, to regulate the distribution of fissionable material and the uses to which they may be put, and general regulatory functions necessary to the proper operation of such a commission which has been given a complete governmental monopoly in the field of research and production of atomic energy.

Section 12 of the Atomic Energy Act sums up, clarifies and enumerates the authority, powers and duties of the Commission in general in its overall activities of maintaining advisory boards, promulgating rules and regulations, and functioning in the field of research and production.

More specifically, however, Section 4(c)(2) of the Atomic Energy Act pertains to the "activities" of the Atomic Energy Commission in the field of research and production.

Section 4(c) (2) shows us only two activities authorized by Congress for the Atomic Energy Commission:

- (1) "The Commission is authorized and directed to produce . . . fissionable materials in its own facilities."
- (2) "The Commission is authorized and directed . . . to provide for the production of fissionable material in its own facilities."

In connection with the provision for production by the Atomic Energy Commission, Section 4(c)(2) goes on to state what the Commission's activities in this field shall be:

- (1) "... the Commission is authorized to make, or continue in effect, contracts with persons obligating them to produce fissionable material ..." (Emphasis supplied.)
 - (2) "The Commission is also authorized to enter into research and development contracts . . ." (Emphasis supplied.)
- (c) "Activities" of the Atomic Energy Commission within the purview of Section 9(b) do not include "activities" of independent contractors in the performance of their contracts.

Nowhere in Section 9(b) of the Atomic Energy Act can a specific reference to independent contractors be found. This Court's attention is once more respectfully called to the fact that the only immunity from State taxation provided in Section 9(b) is for:

- (1) "The Commission
- (2) "and the ..., activities, ... of the Commission ..."

As for "activities," the only activities provided for are "activities of the Commission," "Manhattan Engineer District," and "or their agents." It seems clear that only the activities "of the Commission" were intended to be exempt or are exempt from State taxation by the authority vested in Congress and provided in the Atomic Energy Act. Independent contractors were not intended to be exempt since nowhere in the Atomic Energy Act are activities of independent contractors mentioned as an "activity" of the Atomic Energy Commission.

. In United States vs. Silk, 331 U. S. 704, 712, this Court said:

"Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees."

It follows, therefore, that his activity in the manual building would not be the activity of the industry with whom he contracted. The State of Georgia respectfully contends that the activity of the Atomic Energy Commission in this case did not go beyond the act of entering into a contract with the respondents. The performance of the contract by the respondents is their own activity. The very concept of the acts of an independent contractor being the acts of or activity of the Atomic Energy Commission is contradictory, Within the scope of his agency, an agent's activity is the activity of his principal but an independent contractor's activity is his own activity limited only by the proper completion of an objective. In other words, the independent contractor's acts are acts for and not acts of the other contracting party.

The argument that the use of the word "activities" by the Congress is meaningless except as interpreted by the majority in the Supreme Court of Tennessee is without merit. We view the use of the word as restric-

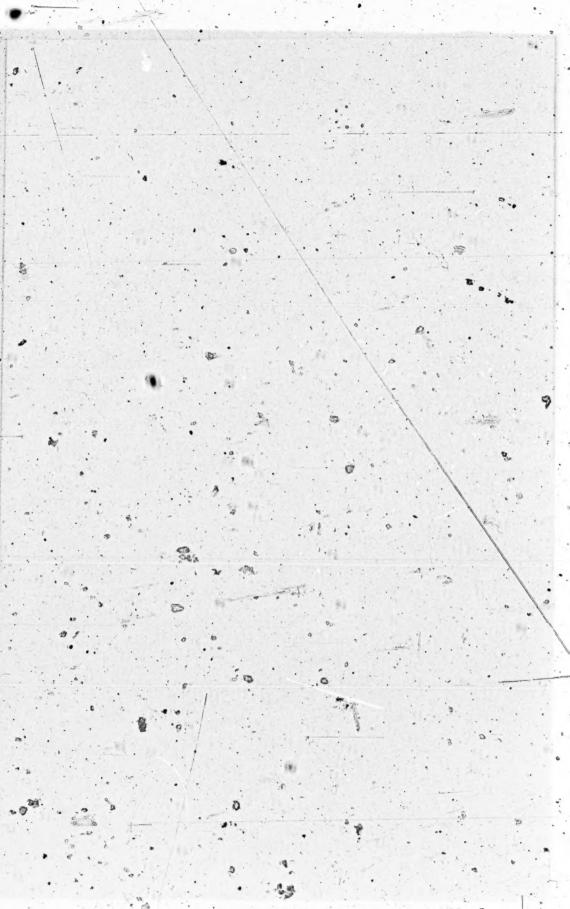
tive rather than expansive. Congress has refused to exempt the activities of independent contractors in the past and it is urged that this is but another statement to the same effect.

It is conceded that the income of the Atomic Energy Commission, the property of the Atomic Energy Commission and the activities of the Atomic Energy Commission would be exempt under the doctrine of implied constitutional immunity without the necessity of statutory language and it is respectfully urged that the listing of income, property and activities of the Atomic Energy Commission is clearly indicative of restriction. These exemptions are already enjoyed. The Congress in listing them is merely making it clear beyond peradventure that the exemption is not to be extended to others who may engage in activities of their own in the performance of contracts with the Atomic Energy Commission.

The State of Georgia respectfully submits that the Supreme Court of Tennessee has incorrectly, unnecessarily and loosely interpreted Section 9(b) of the Atomic Energy Act of 1946 and adds its request that the writ of certiorari be granted.

201 State Capitol Atlanta, Georgia Respectfully submitted,
EUGENE COOK,
Attorney General
M. H. BLACKSHEAR, JR.
Deputy Assistant Attorney
General
GEORGE E. SIMS, JR.
Assistant Attorney General

ROBERT H. GAMBRELL Assistant Attorney General



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OCT 12 1951

Supreme Court of the United States

OCTOBER TERM, 1951

Nos. 186 and 187

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXA-TION FOR THE STATE OF TENNESSEE, PETITIONER,

versus

ROANE-ANDERSON COMPANY ET AL. RESPONDENTS,

AND

SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXA-TION FOR THE STATE OF TENNESSEE, PETITIONER,

versus

CARBIDE AND CARBON CHEMICAL CORPORATION ET AL., RESPONDENTS

BRIEF OF THE STATE OF SOUTH CAROLINA AMICUS CURIAE

T.C. CALLISON,

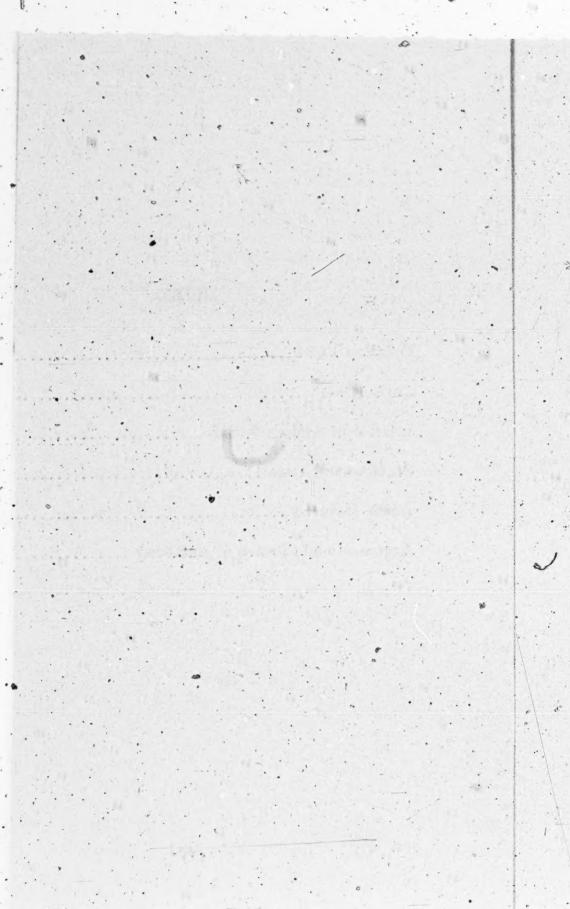
Attorney General of South Carolina.

CLAUDE K. WINGATE,
Assistant Attorney General
of South Carolina.

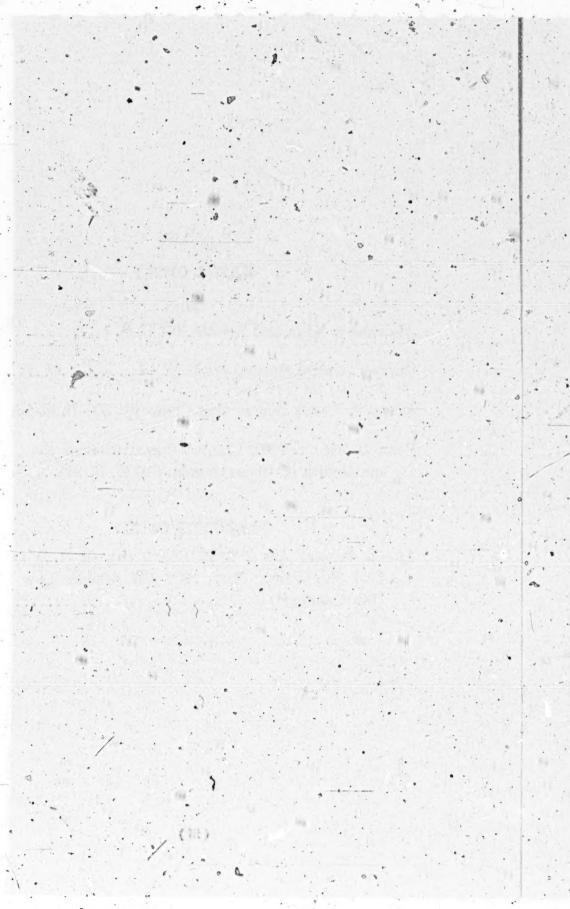


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Supreme Court of the United States

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SAM K. CARSON, COMMISSIONER OF FINANCE AND TAXA-TION FOR THE STATE OF TENNESSEE, PETITIONER,

versus

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Tersus

CARBIDE AND CARBON CHEMICAL CORPORATION ET AL., RESPONDENTS

BRIEF OF THE STATE OF SOUTH CAROLINA AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The State of South Carolina by its Attorney General and pursuant to Rule 27-9 (d) of this Court, files this brief in support of a petition for the writ of certiorari to the Supreme Court of the State of Tennessee, filed in this Court

by Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee.

REFERENCE TO REPORTS OF OPINIONS IN COURTS BELOW

These cases were consolidated for trial in the Chancery Court for Davidson County, Nashville, Tennessee, and but one opinion was rendered disposing of the consolidated cases (No. 186R.50, No. 187R.47). This opinion is not reported. Three opinions were filed by the Supreme Court of Tennessee: a majority opinion (No. 186R.7; No. 187R.5) a concurring opinion (No. 186R.24; No. 187R.23) and a dissenting opinion (No. 186R.26; No. 187R.25), the latter being filed by two of the five Justices who comprise that court These opinions are reported in 239 S. W. (2d) 27.

STATEMENT OF JURISDICTION

The State of South Carolina adopts the statement of jurisdiction as made in the brief for petitioner.

strued a Federal Statute, to wit: Section 9 (b) of the

In addition, the Supreme Court of Tennessee has con-

Atomic Energy Act of 1946, that an independent contractor is not liable for the taxes imposed by the Tennessee Sales and Use Tax Act. The Supreme Court of Tennessee having rested its decision upon an improper interpretation of Section 9 (b) of the Atomic Energy Act of 1946, a Federal question of grave importance has been raised not heretofore decided by this Court. The question presented is of much importance to a number of states and should be decided by this Honorable Court. Unless a determination of

this question is made by this Court there will be much confusion and much litigation in several states, which litiga-

INTEREST OF THE AMICUS CURIAE

- 1. The General Assembly of the State of South Carolina enacted a sales and use tax on the retail sale of tangible personal property. This act became applicable on July 1, 1951, and has not yet been printed in the Acts. This Act is substantially the same as the Tennessee Act except that the South Carolina Act levies the tax on the purchaser or consumer and not upon the vendor. This difference would not affect the issues here as to the respondents in this case.
- 2. The Atomic Energy Commission is now having constructed by contract a huge plant within South Carolina, which plant is known as the Savannah River Project.
- 3. The Atomic Energy Commission has entered into a cost-plus-fixed fee contract with E. I. duPont deNemours and Company, which contract calls for the expenditure of many hundreds of millions of dollars—we are informed nearly the billion dollar mark. This independent contractor will spend great sums in the State of South Carolina for the purchase of materials and supplies with which to construct this project. A proper construction of Section 9 (b) of the Atomic Energy Act of 1946 will determine to a great extent whether or not purchases of tangible personal property by the duPont Company will be subject to the South Carolina Sales or Use Tax.

STATEMENT OF THE CASE

The State of South Carolina adopts the statement of the case as made in the brief for petitioner.

ISSUES INVOLVED

The questions presented by the petitioner and reasons for granting the writ of certiorari are briefly as follows:

1. Does Section 9 (b) of the Atomic Energy Act of 1946, 42 U. S. C. A., 1951 Supplement, Section 1809 (b); exempt from State sales or use tax the purchase and use of tangible personal property by cost-plus-fixed fee contractors of the Atomic Energy Commission as being "activities" of the Commission itself?

· ARGUMENT AND CITATION OF AUTHORITY

The doctrine of implied constitutional immunity is not applicable to respondents since they are independent contractors making their own purchases of material and supplies.

The Supreme Court of Tennessee determined that respondents were independent contractors and not agents of the Atomis Energy Commission.

This Court has held on a number of occasions that the doctrine of implied constitutional immunity from taxation is not applicable to independent contractors even though they are performing a contract for the United States.

James v. Dravo Contracting Company, 302 U.S. 134,

State of Alabama v. King and Boozer, 314 U. S. 1, Curry v. United States, 314 U. S. 14

In the case of Aiabama v. King and Boozer, which we think is applicable here, this Court said:

"They were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors."

Certainly the great trend of the present and late decisions of this Court is not to extend governmental immunity from state taxation, that is, beyond the national government itself and functions performed by its officers and agents. The constitution under its present interpretation by this Court presupposes the continued existence of the states functioning in co-ordination with the national government. Under such interpretation the states have authority to lay taxes and to regulate their internal affairs and policy. State taxation necessarily imposes some burdens upon the national government, but, so long as such burden is not direct it does not come within the constitutional limitation.

Penn Dairies v. Milk Control Commission of the Commonwealth of Pennsylvania, 318 U.S. 261, 270, 271.

Any tax exemption claimed by respondents must come from express Congressional grant.

The Supreme Court of Tennessee said: 0

"Did the Congress of the United States enact appropriate legislation to immunize the independent contractors involved in the case?" (No. 186R.18, 19: 187R.17).

It is not questioned that Congress possibly could have enacted such legislation, but, as was said in State of Alabama v. King and Boozer:

"Congress has declined to pass legislation immunizing from State taxation, contractors under 'costplus' contracts for the construction of governmental projects." The fact that Congress failed to expressly prohibit the states from taxing independent contractors when contracting for the United States leads to but one conclusion and that is, such was not intended by the Congress. If the Congress had so intended it would have expressly stated such exemption and such could not be read into the statute.

It is earnestly contended that if the Congress had power to immunize these independent contractors from state taxation it would have done so by clear and precise language so that there would be no question thereabouts.

We know of no legal definition of the word "activities" which would give it the meaning given it by the Supreme Court of Tennessee, that is, that such "activities" would extend to and include cost-plus-fixed fee contractors.

The Atomic Energy Act of 1946 does not in any of its terms exempt from state sales and use taxation the purchase and use of tangible personal property by independent cost-plus-fixed fee contractors, even though such contracts are with the Commission.

It is a sound rule of construction that when the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to statutory interpretation. It is only when the words of the statute need interpretation that the Courts are called upon to pass thereon. In this statute there are no words exempting respondents from the tax.

The Congress exempted by plain language the income of the Atomic Energy Commission, its property and its activities. We submit that such would have been exempt under the doctrine of constitutional immunity and it is strange that having put words in the statute which were not necessary, Congress would have left out those now contended for by respondents.

The State of South Carolina respectfully submits that the Supreme Court of Tennessee has incorrectly and loosely interpreted Section 9 (b) of the Atomic Energy Act of 1946, thereby raising a serious Federal question and request that the writ of *certiorari* be granted.

Respectfully submitted,

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Attorney General of South Carolina.

CLAUDE K. WINGATE,

Assistant Attorney General
of South Carolina.

PARY SUPREME COURT, U.S. Office-Supreme Cover, V. S.*

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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1951

Nos. 186 and 187

SAM K. CARSON, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner.

ROANE-ANDERSON COMPANY.

S

Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee,

Petitioner.

CARBIDE AND CARBON CHEMICAL CORPORATION.

BRIEF OF THE STATE OF WASHINGTON AMICUS CURIAE

SMITH TROY,
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CARBIDE AND CARBON CHEMICAL CORPORATION

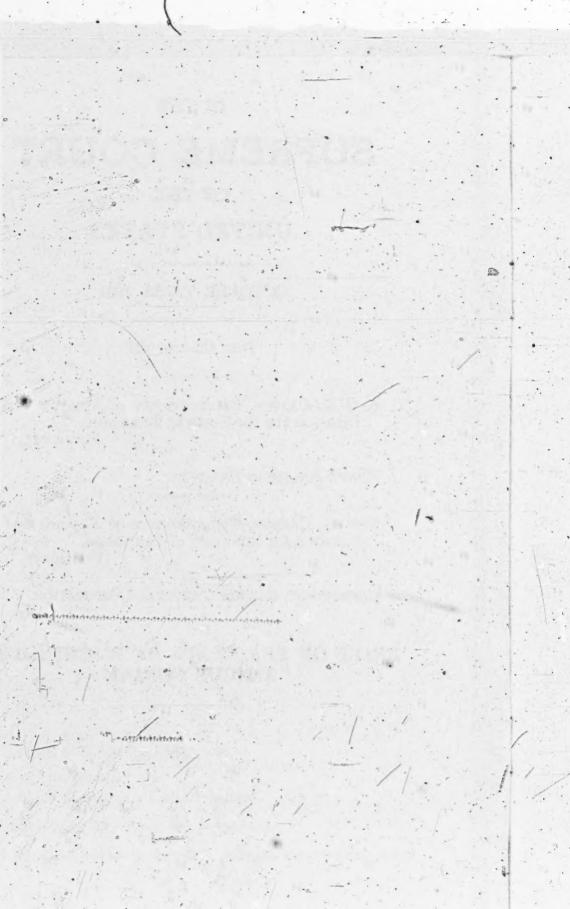
BRIEF OF THE STATE OF WASHINGTON AMICUS CURIAE

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CARBIDE AND CARBON CHEMICAL CORPORATION.

MOTION FOR LEAVE TO FILE BRIEF OF THE STATE OF WASHINGTON AMICUS CURIAE

Smith Troy, Attorney General of the State of Washington, and C. John Newlands, Assistant Attorney General of the State of Washington, move this Court that leave be granted to file Brief of the State of Washington Amicus Curiae in the above entitled causes, pursuant to rule 27, paragraph 9, of the Supreme Court of the United States.

SMITH TROY,
Attorney General of Washington

C. JOHN NEWLANDS,
Assistant Attorney General of Washington

Attorneys for the State of Washington, Amicus Curiae.

IN THE

SUPREME COURT

OF THE UNITED STATES

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Nos. 186 and 187

Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner,

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Sam K. Carson, Commissioner of Finance and Taxation for the State of Tennessee, Petitioner,

CARBIDE AND CARBON CHEMICAL CORPORATION.

BRIEF OF THE STATE OF WASHINGTON AMICUS CURIAE

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The State of Washington, by its Attorney General and pursuant to Rule 27, paragraph 9, of this Court, files this brief in support of the petitioner in the above entitled actions.

INTEREST OF AMICUS CURIAE

The State of Washington imposes a "business and occupation tax" upon all persons doing business in Washington for the privilege of engaging in business in the State. Such tax is imposed upon those persons making retail sales at the rate of 1/4 of 1% of the gross proceeds of their retail sales. Title II, Chap. 180, Washington Laws of 1935, as amended.

The General Electric Company, through a contract with the United States Government, supervised by the Atomic Energy Commission, manages and operates the Hanford Works, which is a huge installation in the State of Washington for the production of plutonium and for possible other operations in the atomic energy field. The tangible personal property sold, furnished, or consumed and the services rendered in the performance of such contract constitute a "retail sale," as that term is defined in the above statute.

The State of Washington is now engaged in litigation with the General Electric Company to determine whether that private corporation is subject to payment of the Business and Occupation Tax measured by its gross receipts from the United States for such retail sales in the management and operation of the Hanford Works. This case is now on appeal in the Supreme Court of the State of Washington (General Electric Company v. State of Washington, Docket No. 31962).

The questions involved in the instant actions are substantially the same as are involved in the case of General Electric Co. v. State of Washington: both the respondents and General Electric Company operate under a contract with the United States Government under

supervision of the Atomic Energy Commission; the question is whether a State in which such a contract is performed may tax the contractor measured by its receipts thereunder; the effect of section 9 (b) of the Atomic Energy Act of 1946 upon such state taxation is involved.

The issues are not identical because the instant cases involve sales and use taxes, taxes upon a vendor who sells to a federal contractor or upon the contractor for the privilege of using personal property the sale of which was not subjected to the sales tax; the General Electric case involves a tax on the federal contractor itself for the privilege of engaging in business activities in the State measured by its gross receipts from the performance of the contract? The differences are the same in . incidence of a tax as were involved on one hand in James v. Dravo Contracting Co., 302 U. S. 134 (involving a gross receipts business tax on a federal contractor), and on the other hand in Alabama v. King & Boozer, 314 U. S. 1 (involving sales tax on a vendor for sales to a federal contractor for use in performance of the contract), and Curry v. United States, 314 U. S. 14 (involving a use tax on the federal contractor for materials used in the performance of the contract).

Any decision by this Court in the present action will quite certainly influence, and perhaps control, the decision of the Supreme Court of Washington in the case now before it.

STATEMENT OF THE CASE

The State of Washington adopts the statement of the case as made in the brief of petitioner.

STATEMENT OF THE QUESTIONS INVOLVED

The State of Washington, in stating the questions involved, will not pinpoint the issues to the particular state tax involved because its interest, as stated above, concerns a tax having a slightly different legal incidence. As more broadly stated below the questions are the same as are involved in its litigation with General Electric Company. Such questions are:

I. Whether section 9 (b) of the Atomic Energy Act of 1946 by its terms exempts an independent contractor with the United States operating under the direction of the Atomic Energy Commission from state excise taxation in its management and operation of an atomic energy installation.

II. Whether Congress has the power to exempt an independent contractor with the United States from non-discriminatory, nonexcessive state taxation in the performance of such a contract.

ARGUMENT AND CITATION OF AUTHORITIES

It was held in the court below—and it cannot be seriously contested—that respondents are independent contractors with the United States Government operating under a cost-plus-fixed-fee contract. Such was the ruling of both the trial and appellate courts of the State of Tennessee. It follows, and so held the Supreme Court of Tennessee, that the issues in this case are controlled by Alabama v. King & Boozer, 314 U. S. 1, and Curry v. United States, 314 U. S. 14, unless section 9 (b) of the Atomic Energy. Act operates to exempt such independent contractors from state taxation with respect to such activities. It is the position of the State of Washington that section 9 (b) does not exempt respondents herein from state excise taxes.

It is the position of the State of Washington that section 9 (b), by its own terms, is not adequate to indicate a desire on the part of Congress to grant exemption from state taxation of those contractors which manage and operate atomic energy installations under contract with the Federal Government; such position will be stated in Section I of this argument. It is the further position of the State of Washington that Congress has no authority to exempt such independent contractors from nondiscriminatory, nonexcessive state taxation with respect to the performance of contracts with the Federal Government; such position will be stated in section II of this argument.

I. Section 9 (b) of the Atomic Energy Act of 1946 does not by its terms operate to exempt an independent contractor with the United States operating under the supervision of the Atomic Energy Commission in the management and operation of an atomic energy installation from state taxation with respect to such activities.

Section 9 of the Atomic Energy Act is entitled "Propa erty of the Commission." A reading of the entire section is essential to an understanding of the last sentence, upon which reliance is placed by respondent for its claim of tax exemption. Subdivision (a) of that section deals with the transfer of all property interests theretofore accumulated for the production of fissionable material, atomic weapons, etc., to the Atomic Energy Commission. Subdivision (b) provides for the making of lieu payments to the various States and localities in which activities of AEC are carried on in substitution for taxation of the property so transferred to AEC. Having provided for payments in lieu of taxes upon its property, Congress then expressly exempted AEC from taxation by any State or subdivision thereof of its "property," "income," or "activities."

Concerning the contents of section 9, the congressional committee reported as follows:

"The Commission is to take over all the resources of the United States Government devoted to or related to atomic energy development. This includes all atomic weapons, all property of the Manhattan Engineer District, and all patents, materials, plants and facilities, contracts, and information relating primarily to atomic energy. The Commission is authorized to reimburse States and municipalities for loss in taxes incurred through its acquisition of property." Report of Special Committee on Atomic Energy, Report No. 1211, 79th Congress, 2d Session.

This report supports the interpretation that section 9 pertains only to the property to be owned by the Com-

mission, and to lieu payments to state and local government for the loss of property taxes.

The only basis upon which state tax exemption can be found in section 9 is in a broad, and unwarranted, interpretation of the word "activities" as used in that section. The act exempts from taxation "property," "income," and "activities" of the commission. Certainly we are not here involved with either property taxation or income taxation. We are involved with excise taxation upon what might be considered activities of respondents, as federal contractors. Are the activities of such contractors "activities" of AEC?

If Congress were granting exemption from state taxation to federal contractors, Congress would have been doing so for the first time in history. Never before (to the knowledge of amicus curiae) has Congress even attempted by statute to grant exemption from state taxation to mere contractors with the Federal Government. Congress well knew this, for the issue of granting such exemption had several times before been before it, and has been rejected. Congress having the above in mind, it is submitted that it would not have been so obtuse as to use the indefinite words "activities

* * of the Commission" to exempt contractors with AEC from state taxes.

Where Congress has granted tax exemption (in a field where it has such power for the protection of its own instrumentalities such as Home Owner's Loan Corporation, Reconstruction Finance Corporation, and Federal Land Banks) its language has never been vague or ambiguous. Congress knew in 1946 when considering the Atomic Energy Act that development of atomic energy

installations, the operation thereof, and the production at such installations as Oak Ridge and Hanford were being taxed by the States in which such installations were located. Reference to the record of the proceedings of the congressional committee considering the Atomic Energy Act will evidence this. In view of this knowledge, had Congress desired to eliminate such state taxation, would it have been vague and ambiguous in its selection of words to achieve this purpose? It would have been simple draftsmanship to attempt to exempt the independent contractors with AEC. The failure to take this obvious and simple step can only indicate an intent to grant exemption to the Atomic Energy Commission only.

Congress had referred to the use of contractors by AEC in its performance of its functions (as was the practice under Army control), referring expressly to "contracts" and the use of "contractors" in sections 3 (a), 4 (c), and 10 (b) (5) (A). Even assuming an agency rather than independent contractual relationship, it is most significant that within section 9 (b) itself (the second sentence) Congress referred both to the "activities" of AEC and to the "activities" of the agents of AEC; but in the fourth sentence (which relates to tax exemptions), Congress referred only to the "activities" of AEC, and not to those of its agents. Such express inclusion of agents in one regard in one sentence of a section and exclusion in a closely following sentence in another regard can only indicate an intent that the application of the latter sentence be not so broad as the former. If the word "activities" in the second sentence does not include operations of the Commission through its agents, or even independent contractors, necessitating the reference to its "agents," then the same word "activities" in the fourth

sentence should be construed no more broadly. The word cannot have two different meanings in the same section. Thus, activities of the Commission cannot include activities of the agents of the Commission, and much less, independent contractors with the Commission.

Two arguments are used by opponents of State taxation for the expansion of the word "activities" to include a tax exemption for contractors with AEC. It is first argued that AEC, as an agendy of the United States, is already the exempt; therefore statutory exemption is unnecessary and Congress would not do a useless act. While statutory exemption may have been unnecessary, nevertheless Congress has seen fit in other cases (e.g., HOLC, RFC, and Federal Land Banks) to express such exemption by statute. We might again point out that when Congress did expressly grant exemption, its meaning was clear and its language explicit.

The second argument asks what the word "activities" means if it does not refer to the operations of the AEC through contractors. We submit that the inclusion of the word "activities" was intended to cover excise taxation which could have had its incidence upon the various activities of AEC such as sales, purchases, use of property, and manufacturing. The last sentence of section 9 (b) eliminates state taxation of the "property" of the Commission, the "income" of the Commission, and the "activities" of the Commission. This effectively eliminates the three types of taxation which might be expected. It may be well again to point out that earlier in section 9 (b), when using the word "activities," Congress did not hesitate to speak of "activities of the Commission, the Manhattan Engineer District or their agents," while in

the fourth sentence Congress spoke only of "activities

* * of the Commission."

Further, if "activities" of AEC include the performance of its functions through contractors, a prime contractor with AEC is no more entitled to tax exemption than a subcontractor, a sub-subcontractor, or any vendor supplying property or services which are intended to be and are eventually utilized in the production of atomic energy under the supervision of AEC. There is no logic which will support an interpretation of the word "activities" to include not only AEC but also a contractor with AEC, but still delimit it to prime contractors with AEC. It would only be a matter of degree, and some subcontractors could be closer in degree to AEC than some prime contractors. A performance of work by a subcontractor or any supplier would be as much the "activity" of AEC as is such performance by a prime contractor with AEC.

We respectfully submit that section 9 (b) does not by its own terms grant exemption to respondents herein from state taxation in the performance of their contracts with the United States Government under the supervision and control of the Atomic Energy Commission. II. Congress does not have power to exempt an independent contractor with the United States from nondiscriminatory, nonexcessive state taxation in the performance of a contract with the United States.

While this Court has several times referred to the failure of Congress to grant exemption to contractors with the Federal Government as supporting an argument that no such exemption existed under the doctrine of implied intergovernmental immunities, this Court has never decided that Congress does have delegated power under the Constitution of the United States to grant such exemption. Certainly Congress has not been expressly delegated with power to grant such exemption, and any such authority depends solely upon finding that such exemption is necessary and proper for carrying into execution the expressly delegated powers. U. S. Const. Art. 1, § 8, cl. 18. It is submitted that the granting of such tax exemption by Congress is not necessary and proper to the carrying out of functions delegated to the Federal Government.

In the instant case we are not dealing with a tax upon the Government of the United States nor upon its property. James v. Dravo Contracting Co., 302 U. S. 134. Compare: Mayo v. United States, 319 U. S. 441; United States v. Allegheny County, 322 U. S. 174. We are not dealing with a tax upon an instrumentality of the Federal Government, respondents are independent contractors. James v. Dravo Contracting Co., 302 U. S. 134; cf., Mc-Culloch v. Maryland, 4 Wheat. 316. The tax involved is nondiscriminatory and nonexcessive; it is no more than that borne by all others engaged in business in the taking State. We are not concerned with a tax upon a government contract. The tax is an excise tax, a tax upon

business for the privilege of engaging in business. Hooten v. Carson, 186 Tenn. 282.

. If we were concerned with a tax upon an instrumentality of the Federal Government, there is no question but that Congress could immunize its activities within its power to protect that which it may create. Decisions of this Court have protected and accepted statutes of Congress declaring that immunity should be granted to agencies created by Congress. In Pittman v. Home Owners' Loan Corp., 308 U.S. 21, this Court held that because the creation of HOLC was within the powers of Congress, the granting of exemption from state taxation was within its powers to protect such a federal instrumentality. In Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95. this Court referred to the fact that the federal land banks were created under the Federal Farm Loan Act, and that as such they were instrumentalities of the Federal Government. Having so found, this Court honored as within 5 Congress' powers an express statutory declaration that the banks should not be taxed with respect to their activities. In Maricopa County v. Valley National Bank, 318. U. S. 357, the Court was faced with a statute in which Congress declared that States should not tax the Reconstruction Finance Corporation except in certain particulars set forth therein. After finding that RFC was a federal instrumentality, this Court said that Congress has the power to determine the extent to which its instrumentalities may be taxed, and thus could restrict or even prevent state taxation.

But we are not here involved with a federal instrumentality. We are dealing with a mere contractor with the Federal Government, one which contracted with the United States through the United States Army, and which contract has now been placed under the supervision of the Atomic Energy Commission. State excise taxation of such contractors in the field of business taxes, sales taxes, and use taxes, has been upheld by this Court. James v. Dravo Contracting Co., 302 U. S. 134; Silas Mason Co. v. Tax Commission, 302 U. S. 186; Alabama v. King & Boozer, 314 U. S. 1; Curry v. United States, 314 U. S. 14. In those cases, as well as in numerous others decided by this Court, it was held that the mere "economic burden" of such a tax as it was passed on as a cost to the Federal Government was not sufficient to invalidate the same.

In the foregoing, as well as in other cases to be cited below, this Court has had occasion to declare that the particular state tax before it was valid in the absence of action by Congress. However, this Court has never held that Congress does have the power to exempt such independent contractors from state taxation with respect to the performance of a contract with the Federal Government. In such cases, this Court has often stated that it was not faced with the problem of determining whether such power existed. It often referred to the absence of congressional action, using that as support for a decision upholding a state tax; but such argument can in no manner be interpreted as a holding that Congress had such power.

In Graves v. New York ex rel. O'Keefe, 306 U. S. 466, this Court upheld the power of states to tax the income of employees of HOLC, but said:

"Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity

of federal agencies which courts have implied, is a question which need not now be determined."

In Alabama v. King & Boozer, 314 U. S. 1, adopted by the opinion in Curry v. United States, 314 U. S. 14, this Court stated:

"Congress has declined to pass legislation immunizing from state taxation contractors under 'cost-plus' contracts for the construction of government projects. Consequently, the participants in the present taxation can enjoy only such tax immunity as is afforded by the Constitution itself, and we are not now concerned with the extent and the appropriate exercise of the power of Congress to free such transactions from state taxation of individuals in such circumstances that the economic burden of the tax is passed on to the National Government."

In Oklahoma Tax Commission v. The Texas Company, 336 U. S. 342, this Court held that lessees of Indian lands could be subjected to state excise taxation, but said:

"We do not imply, by this decision, that Congress does not have power to immunize these lessees from taxes we think the Constitution permits Oklahoma to impose in the absence of such action. The question whether immunity shall be extended in situations like these is essentially legislative in character."

However, the last quoted passage of the opinion must be read in the light of the prior finding of the Court that lessees of Indian lands might be regarded as federal instrumentalities, performing functions within federal powers and policy in the conduct of Indian affairs.

So, if this Court finds section 9 (b) of the Atomic Energy Act is adequate in language to confer tax exemption upon independent contractors with the Federal Government, it is faced for the first time squarely with the issue of whether Congress has the power to grant such

immunity. We submit that Congress does not have such power.

If Congress has such power it is only because it is "necessary and proper" to the carrying out of one of its expressly delegated functions. There is no showing that exemption of the sort of normal and expected State tax here involved is either necessary or proper. The only showing is that such a tax may be passed on to the Federal Government as a cost, so that the "economic burden" of the tax is on the United States. Nothing else is shown to support a finding of necessity or propriety for the exercise of such power.

But this Court has held on numerous occasions that the mere economic incidence of a state tax on the Federal Government is not sufficient to strike down a state tax on a federal independent contractor based upon an implication of immunity. On the other hand, this Court has recognized its position as a tribunal charged with the duty to protect the delegated powers of the Federal Government in their performance, even where Congress has not forbidden a tax, where the situation indicates a burden on the Government. It does not hold that the mere economic incidence of a nondiscriminatory, nonexcessive state tax is a burden.

How then can Congress find that such a nondiscriminatory, nonexcessive tax, such as that of Tennessee, is such a burden that its elimination is necessary and proper? The tax is no worse in its effect with a statute on the books which outlaws it. Is its elimination "necessary and proper"?

If it is not such a burden on the Government sufficient to raise an implied immunity, is it such a burden as to be within Congress' power to do that which is necessary and proper to the exercise of the admitted power of the United States to enter contracts for atomic energy production and development? We submit that it is not such a burden, and that Congress has no power to invalidate such a nondiscriminatory state tax. As this Court said in Alabama v. King & Boozer, 314 U. S. 1:

"So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity."

Congress cannot lift itself by its own bootstraps, giving itself powers by its declaration through legislation. It follows that the fact that Congress may choose to legislate on a subject is not relevant in the determination if it has power to so legislate. The only question is whether it could have so legislated in any event.

If state taxes are to be expected as an economic burden of the United States in the conduct of its affairs, as are federal taxes an economic burden on the States, and if a state tax be nondiscriminatory and not excessive in amount, it is submitted that there is no ground upon which it may be found that the granting of tax exemption is necessary and proper to the carrying into execution of powers vested in Congress.

A decision by this Court that Congress has power to grant tax exemption to independent contractors with the Federal Government would have a tremendous and tragic effect upon the powers of state government. If Congress

has the power to exempt from normal state taxation any more than the Federal Government, or the agencies and instrumentalities created by it to exercise federal powers, if Congress can go beyond the "person" of the Government to the activities of others with the Government and exempt such other persons from taxation with respect to those activities merely because of the economic effect of the normally expected state taxes on the Federal Government, it is submitted that Congress would have a stranglehold on the very life of the state governments.

Although taxes may not be a legal obligation of a consumer, and may strike a manufacturer or vendor or other business person or function, it is an accepted economic fact that taxes are "passed on" to successive purchasers, and are ultimately borne by the consumer. The "economic burden" is on the consumer. Thus, the United States Government as a consumer bears the economic burden of a portion of all taxes—federal, state, and local—which are at various stages of production and sale imposed upon the products and the business concerns handling products ultimately consumed by the Government.

If the basis of congressional power to grant tax exemption is the economic burden on the Government in the exercise of its delegated powers, and if we are not concerned with a discriminatory tax or an excessive tax but are concerned only with an expected, normal state tax on a private individual, Congress can have no power under the "necessary and proper clause" to grant exemption. If Congress has such power, by the nature of the power being based on the economic incidence on the United States, Congress is not restricted to tax immunization of those doing business directly with the Government. The

burden is just as great, and probably many times greater, with respect to the taxes imposed upon those subcontractors, sub-subcontractors, vendors of supplies and materials, manufacturers, extractors, etc., having their place earlier in the economic process. Thus, Congress could reach any person and prevent his being taxed with respect to any activity or product traceable ultimately to the Federal Government. The separation of such taxes would be a practical impossibility.

These are the logical results of finding that Congress, has the power to prevent normal and expected state taxation of independent contractors with the United States Government. The Court's attention is directed to the near-absolute power such a decision would give Congress over the revenue-raising ability of the States; the logical extension of this is that Congress would have such a stranglehold on the economy of the States as to amount to control over their existence as the independent sovereignties intended in the Constitution.

Nor is the argument that the power to tax is the power to destroy of any avail. This Court has repudiated that doctrine before. If the tax be excessive or discriminatory, this Court would then find the tax to be such a burden as to be within the field of implied immunities. Oklahoma Tax Commission v. Texas Co., 336 U. S. 342, and cases cited. And if the tax be of such nature, we do not challenge the power of Congress to immunize independent contractors from such improper taxation. This would be well within Congress' power to protect performance of functions of the United States Government from interference. James v. Dravo Contracting Co., 302 U. S. 134.

CONCLUSION

Because we believe that the Supreme Court of Tennessee has incorrectly interpreted section 9 (b) of the Atomic Energy Act of 1946, and because we believe that Congress has no power to immunize mere federal contractors from state taxation of the type here involved, the State of Washington, as amicus curiae, submits that the judgment below should be reversed.

Respectfully submitted,

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